No. 85-1090

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, Indiana, et al.,

Appellants

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether this Ordinance making coercion, force, assault, and trafficking in pornography civilly actionable as sex discrimination violates the right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States.

(2) Whether an allegation that the mere existence of a civil law creates a chilling effect on the exercise of the right to freedom of speech is sufficient to establish a "case or controversy" under Article III of the Constitution of the United States.

(3) Whether the federal courts should abstain from ruling on the constitutionality of an ordinance which has never been enforced and whose terms have never been construed by the state courts.

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WILLIAM H. HUDNUT, III, Mayor
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Appellants

vs.

AMERICAN BOOKSELLERS ASSOCIATION,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

William H. Hudnut, III, Mayor of the City of Indianapolis, et al.[1], Appellants, appeal from the final

[1] Pursuant to Supreme Court Rule 15.1(b), Appellants hereby list those parties whose names are not contained in the caption. In addition to William H. Hudnut, III, Mayor of the City of Indianapolis, the other appellants are the City of Indianapolis; the County of Marion; the Department of Administration of the City of Indianapolis; the Office of Equal Opportunity of the City of Indianapolis; the Equal Opportunity Advisory Board of the City of Indianapolis; Joseph McAtee, Chief of Police of the City of Indianapolis; Stephen Goldsmith, Marion County Prosecutor; and James Wells, Marion County Sheriff.

The appellees not listed in the caption consist of the Association of American Publishers, Inc.; the Council for Periodical Distributors Associations; the Freedom to Read Foundation; the International Periodical Distributors Association, Inc.; Koch News Company; National Association of College Stores, Inc.; Omega Satellite Products Co.; Video Shack, Inc.; and Kelly Bentley.

judgment of the United States Court of Appeals for the Seventh Circuit, dated August 27, 1985, and submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals, which appears in the Appendix hereto, pp. A-1 through 22, is reported at 771 F.2d 323 (1985).

The opinion of the United States District Court for the Southern District of Indiana, which appears in the Appendix hereto, pp. B-1 through 52, is reported at 598 F.Supp. 1316 (S.D. Ind. 1984).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit, declaring the definition of pornography contained in Section 16-3(q) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana unconstitutional, was entered on August 27, 1985. See App., A-1. A petition for rehearing with a suggestion for rehearing en banc was entertained and denied on September 20, 1985. See App., C-1.

A notice of appeal to this Court was duly and timely filed with the United States Court of Appeals for the Seventh Circuit on October 29, 1985. See App., D-1.

This appeal is being docketed in this Court within 90 days from the date of the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCE

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech. . . .

Article III, Section 2.[1], United States Constitution:

The judicial Power shall extend to all Cases ... [and] Controversies....

Section 16-3(q) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana:

Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

Section 16-3(g) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana:

Discriminatory practice shall mean...

* * *

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography....

(5) Coercion into pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography, which injury may date from any appearance or sale of any products of such performance....

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child or transsexual in a way that is directly caused by specific pornography.

(8) Defenses: Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of section 16-3.

The entire text of Chapter 16 of the Code of Indianapolis and Marion County, Indiana is reprinted at Appendix E.

STATEMENT OF THE CASE

On April 23, 1984 the Indianapolis City-County Council passed Indianapolis, Indiana, City-County General Ordinance No. 24. The Ordinance was enacted as an amendment to Chapter 16 of the Code of Indianapolis and Marion County, Indiana, which law prohibits discrimination on the basis of race, color, religion, ancestry, national origin, handicap or sex. The Ordinance identified and prohibited four discriminatory practices based on "pornography": trafficking in pornography, coercion into a pornographic performance, forcing pornography on a person and assault or physical attack due to pornography. It was signed into law by the Mayor on May 1, 1984.

On that same day American Booksellers, et al., filed its complaint against William H. Hudnut, III, et al., with the United States District Court for the Southern District of Indiana, Indianapolis Division, seeking declaratory and injunctive relief against Ordinance No. 24 on the grounds that it violated the First Amendment guarantee of freedom of speech, imposed an impermissible prior restraint and was unduly vague. On May 9, 1984, the District Court issued an uncontested order preliminarily enjoining Hudnut, et al., from enforcing the Ordinance.

On June 11, 1984 the Indianapolis City-County Council passed Ordinance No. 35 which, among other things, redefined pornography to be "the graphic sexual explicit subordination of women, whether in pictures or in words", that also included one of six specific scenarios of degradation or violence against women. Subsequently American Booksellers, et al., amended its complaint to reflect these amendments.

On June 30, 1984 the District Court heard oral arguments on the parties' cross-motions for summary judgment and took the matter under advisement. On November 19, 1984 the court entered its Judgment, Findings of Fact and Conclusions of Law declaring the Ordinances unconstitu-

tional. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court on the grounds that the definition of pornography contained in the ordinance violated the right to freedom of speech protected under the First Amendment to the United States Constitution.

THE QUESTIONS ARE SUBSTANTIAL

At least since *Roth*, this Court has recognized that pornographic materials exist which serve none of the purposes for which speech is constitutionally protected. *Roth v. United States*, 354 U.S. 476, 485 (1957) ("the lewd and obscene...are no essential part of any exposition of ideas..." (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). The doctrine of obscenity, while not the only approach taken to this general area, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *F.C.C. v. Pacifica Fdn.*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982), has constituted the major attempt to provide a workable tool for localities to combat this problem. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985). In spite of all attempts, however, since *Miller*, pornography has grown to an over $8 billion per year industry, conservatively estimated. 1984 U.S. NEWS & WORLD REP. 84 (June 4, 1984). *See also Paris Adult Theatre I, supra*, (Brennan, J., dissenting).

Appellant has taken the lead in passing a unique ordinance that has been widely recognized as an innovative and promising new approach to the social problem of pornography. Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARVARD LAW REVIEW 460, 463 (1984); 1985 NEWSWEEK 58, 60 (March 18, 1985); "[T]his novel measure, whose supposed invalidity follows surely from no clear precedent...may eventually be found to be the most sensible approach to an area which has vexed some of the best legal minds for decades." Letter from L.

Tribe to A. Rainville (Jan. 8, 1984). The "civil rights approach" permits civil suits by victims of pornography's making and use, rather than employing criminal bans on materials found to violate moral standards. The Ordinance focuses on violent sexual materials. Empowering victims to sue would have a major impact both on this industry, about which little effective is being done, and on its social costs, which have escalated as the industry has grown.

Passing on determinations of the constitutionality of local legislation is at the core of this Court's oversight function. The erroneous opinions below are widely perceived as authoritative. If not overturned, they will continue to deter jurisdictions that want this law such as Minneapolis, Los Angeles and Cambridge, Massachusetts. But the urgency to provide relief for victims of the pornography industry guarantees that the full attention of this Court will repeatedly be sought. The substantial conflict between equality rights on the one hand and First Amendment issues on the other — while more suitably resolved in a concrete application — will continue to be pressed until resolved on its merits by this Court.

If an issue of this importance is to be nationally resolved, it should be by this Court, not by the Seventh Circuit. It should be resolved in an opinion, unlike that of the Seventh Circuit, which accurately construes the language of the Ordinance, is alive to the magnitude of the pornography problem, cognizant of the strength of the state interests, and sensitive to this Court's framework for analyzing First Amendment imperatives.

SUMMARY OF ARGUMENT

Because it explicitly refused to balance the interests at stake, the Court of Appeals gave no weight to the record of harm and ignored the equality interests urged by appellants. Bypassing accepted methodology in which legislative exceptions to the First Amendment are sometimes permitted on a showing of social harm, the Court of Appeals' broad approach would invalidate any

regulation of pornography through its harm — no matter how narrowly drawn. The Court of Appeals proceeded as if the Ordinance, to be constitutional, must either fall within a recognized exception or be content-neutral. This is not the law. Moreover, the interests sought to be furthered by this law — sex equality, including equal access to speech — are not only legitimate and substantial, they are compelling.

Seeking to invalidate the Ordinance by invalidating its definition of pornography, the Court of Appeals held *sua sponte* that the Ordinance impermissibly discriminates on the basis of viewpoint. The Ordinance does not restrict pornography on the basis of any point of view articulated or affirmed by pornographers or their consumers, but on the basis of the harms of civil inequality which are exploited and engendered through its making, marketing, and use. The record shows that the pornography industry is constructed on sex-based powerlessness and generates sex-based abuse. Achieving sex equality is a public policy, not a viewpoint; coercion, force, assault and trafficking are not viewpoints, nor is suing for these acts "thought control" (*see* Court of Appeals' opinion, App. A., A-10) since they are not mere thoughts. Powerlessness and abuse are conditions, comprised of acts, which have values intrinsic to them as most acts do. That does not make them points of view. In invalidating the Ordinance wholesale, despite an explicit severability clause, the Court of Appeals swept away potential suits by coerced former pornography models and direct victims of rape as well as citizen suits against sex-based subordination on a society-wide scale.

The Court of Appeals did not so much as mention the line of authority under which government's purpose to eliminate sex discrimination raises "compelling state interests," *Roberts v. U.S. Jaycees*, 104 S.Ct. 3244 (1984), which can outweigh First Amendment rights. Records where this is allowed show comparably less grievous and pervasive harm. They also show a less concretely demonstrated nexus between the speech interests to be curtailed and the aims of the legislation, *e.g.*,

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) (First Amendment interest in sex-segregated job ads outweighed by deduced relation to ending sex segregation in workforce). *See also Beauharnais v. Illinois*, 343 U.S. 250 (1952). Had the interests been balanced under applicable law, pornography, *as defined, and only when* made through coercion, forced on unwilling viewers, the direct cause of assaults, or actively trafficked in communities that do not want it, furthers a governmental purpose in eradicating sex discrimination in violent and violating forms, which interest "overwhelmingly outweighs the expressive interests, if any, at stake." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

The Court of Appeals, in its eagerness to invalidate the Ordinance on the merits, overlooked other technical defects in this litigation. Each alone counsels reversal. From their pleadings, Appellees are a group of legitimate publishers, booksellers, and one customer, not pornographers. Because they allege no actual or threatened injury caused by Appellants, their complaint amounts to no more than an alleged "chilling effect" which alone has never provided requisite injury in fact for constitutional adjudication. *Younger v. Harris*, 401 U.S. 37 (1971); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Appellees are attempting to secure an advisory opinion in an abstract context which would exclude real pornographers, real pornography and its victims, thereby denying this Court an essential factual context in which to adjudicate the constitutionality of this Ordinance. Whether on prudential grounds of proper adjudication, or on technical grounds of standing, there is no Article III "case or controversy" between these parties.

The lack of facts combined with the disregard of the record and distortion of the statutory language produced an opinion based on conjecture, abstract theorizing, and academic commentary to settle statutory meanings. It is to avoid such abuse of the federal judicial function that federal courts abstain from inventing applications and

meanings of complex and novel laws until they are interpreted by state courts.

Appellants therefore request plenary consideration on the grounds that hiding harm to citizens behind the First Amendment has never been the law of the First Amendment.

ARGUMENT

I. Pornography, As Defined, Is Not Protected Speech.

Each court that has reviewed the Ordinance has reaffirmed the legislative findings: "we accept the premises of this legislation." (App. A, A-11; *see also* App. B, B-21) Neither court disagreed with the legislative judgment that these harms are based on sex or questioned the conceptualization of these acts as practices of sex discrimination. The only issue has been whether this harm of sex discrimination matters under the Constitution.

The legislative record shows that the pornography industry produces verbal and visual sexual entertainment made from coercion, rape, extortion, exploitation, intimidation, fraud and unequal opportunities.[2] This material then engenders coercion, rape, extortion, exploitation, intimidation, fraud and unequal opportunities through its consumption. Pornography, as defined, and when coerced, forced on individuals, the cause of assault, or actively trafficked, is inseparable from aggression and terror, crimes, torts, and unspeakable indignities. Although men are also victimized and also covered, women and children are its primary targets and victims.

Having accepted this reality, each court ruled that stopping this injustice is not as important to the

[2] *See* Indianapolis City-County Council Legislative Record, designated Exhibits A-X to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment in the district court (hereinafter "Defendants' Brief").

Constitution as inflicting it. Both assumed that the Ordinance must fit under an existing exception or counterbalance to the First Amendment, primarily obscenity. (*See, e.g.*, App. A, A-3, A-4, A-10, A-16) Inasmuch as the Ordinance was found to be not content-neutral, the interests were not balanced (App. A, A-4) and sex discrimination was found too limited a rationale. (App. A, A-17) To assign such a low value to women's rights, without weighing them against this means of sex-specific victimization, is to legitimize sex inequality.

Because the Ordinance is based on detailed findings of harm (A), and the harm is sex discrimination (B), and the Ordinance does not discriminate on the basis of viewpoint (C), it should have been upheld.

A. **The Court of Appeals ignored accepted First Amendment methodology in cases in which challenged legislation is based on a record of harm.**

Although speech interests are always weighty, they are never absolute, nor are they at all times paramount. Presented with conflicting interests raising speech claims, this Court employs a balancing test. *New York v. Ferber, supra; Pittsburgh Press Co. v. Human Relations Comm'n, supra; Gertz v. Robert Welch*, 418 U.S. 323 (1974); *Healy v. James*, 408 U.S. 169 (1972). When fashioning new exceptions, it does not attempt to fit within pre-existing ones, *e.g., Ferber*, 458 U.S. at 761 (value of obscene materials found irrelevant to specific harm of child pornography).

Because the Court of Appeals admittedly did not weigh the interests, the record it purported to accept was effectively given a weight of zero, treating the First Amendment as if it were an absolute. Also because it did not balance, the Court of Appeals evaded the fact that the materials this Ordinance covers have about as little First Amendment value as it is possible to have and still be pictures and words. "Pornography" is "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of" six concrete categories.

A plurality of this Court has already determined that "sexually explicit" materials are not entitled to fullest First Amendment protection. *Young v. American Mini-Theatres, supra*, (Stevens, J. for the plurality). There is "surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free determination of ideas of social and political significance...." *Id.* 427 U.S. at 61. Obscenity is constitutionally a crime without any showing of harm. *Paris Adult Theatre I, supra*. Trafficking in pornography ought to be civilly actionable *with* such a showing, especially where the materials are predominantly narrowed to the presentation of *violent and illegal* acts in a way that makes them erotic. Valuing materials for their power to do the harm that they do (App. A, A-12) is perverse and unprecedented.

After evaluating the materials the Ordinance covers, the value of which reaches a First Amendment nadir, the Court of Appeals should have *separately* balanced the interests at stake in each of the four causes of action.

1. The coercion provision: How does the Constitution balance the value to Linda Marchiano of her abduction, beatings, torture, and humiliation against the speech value of "Deep Throat," which it took these acts to make, to the pimp and the organized criminals who have marketed her rape as sexual entertainment?[3] Which is more important, what was done to her or the "speech" they made of it? In *Ferber*, faced with the conflict between the harm of the production *and dissemination* of child pornography to the child performers on the one hand, and the First Amendment speech interest in the materials on the other, the Supreme Court had no trouble holding that the materials required and constituted child abuse. 458 U.S. 747 (1982). The record of harm to *coerced* adult women, including some who are murdered to make "snuff" films,

[3] *See* Defendants' Brief, Exhibit U.

130 CONG. REC. S13192 (Oct. 3, 1984) (remarks of Sen. Spector), certainly compares with the showing that justified the elimination of the entire market in child pornography to the *Ferber* Court.

2. The assault provision: What is the speech value to the traffickers in *Violent Stories of Kinky Humiliation, Violent Stories of Dominance and Submission, Bizarre Sex Crimes, Shamed Victims*, and *Water Sports Fetish, Enemas and Golden Showers* balanced against the young woman who was abducted, cut, pierced, sodomized, urinated and defecated on and choked into unconsciousness, of which the Minnesota Supreme Court said "[i]t appears that in committing these various acts, defendant was giving life to some stories he had read in various pornographic books." *State v. Herberg*, 324 N.W. 2d 346, 347 (Minn. 1982).

3. On the force provision: What is the speech interest of a man who forces pornography on his daughter so that she will keep silent about her mother's torture, saying, "if you tell, this is what I'll do to you." MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R. - C.L.L. REV. 1, 41 (1985). The Court of Appeals invalidated this provision although it does not reach the materials themselves. Possible unforced exposure of juveniles to obscenity has long justified criminal prohibitions, *Ginsberg v. New York*, 390 U.S. 629 (1968), along with the interest of *unwilling* adult viewers in avoiding obscene works. *Miller v. California, supra*.

4. On the trafficking provision: Balance the speech value to its traffickers and consumers of "The Domination of Tammy" (which was part of the legislative record) compared with the women and children whom it targets for being hung upside down, rammed with rods, tortured, and told, as "Tammy" was in the film, "this is not rape, this is fun." Weigh the value of this film against the laboratory evidence that predicts, and the social and testimonial evidence that confirms, that the materials covered by the trafficking provision increase attitudes and behaviors of violent and non-violent discrimination, primarily by men

against women. "[T]he most important result of this research...is the finding that these changes in attitudes and arousal are directly related to agression against women." PORNOGRAPHY AND SEXUAL AGGRESSION 63 (E. Donnerstein and N. Malamuth eds. 1984).[1] Balance the interests of women and children trapped in prostitution by the blackmail of the pornography made of them against the speech interest in the existence of the market that provides the incentive and the enforcement for their enslavement.

A final harm that the appeals court neglected to balance constitutes the *First Amendment motive* for this legislation: the effort to mitigate the silence of women, the exclusion from access to speech which both measures and reinforces exclusion from full citizenship. The Ordinance is an effort to expand access to First Amendment rights by affecting the social determinants which currently preclude women from having effective access to speech. These conditions include the sexual abuse which pornography stimulates and sanctions, its erotization of that abuse such that it is experienced as pleasurable rather than violating for the victim, the definition of women as a group for whom such treatment is appropriate and enjoyable, and the social worthlessness of women which is thereby exploited and furthered.

There is an affirmative side to the First Amendment. In order "to facilitate and enlarge public discussion and participation" this Court in *Buckley v. Valeo* rejected the argument that government, in regulating public financing of elections under the First Amendment, must be wholly neutral as to political speech. 424 U.S. 1, 92-93 (1976). To facilitate access of all to public broadcast, access can be regulated. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). Also "[w]hen expression occurs in a setting

[1] The Court of Appeals' statement that "empirical studies" conflict is false. (App. A, A-12) The legislative record expressly states that the 1970 Commission studied *other materials* and asked *other questions* with *less sophisticated methods*. *See* Defendants' Brief, Exhibit V (testimony of Donnerstein).

where the capacity to make a choice is absent, government regulation of that expression may co-exist with *and even implement* First Amendment guarantees." *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) (emphasis added). Indianapolis found sex inequality to be such a setting.

B. **The interest in eradicating sex discrimination should have outweighed the expressive value, if any, of pornography.**

Under the First Amendment, the Ordinance presents a theory of first impression, combing speech and action, *United States v. O'Brien*, 391 U.S. 367 (1968), communicative and noncommunicative elements, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), content and content-neutral features, *Young v. American Mini Theatres, Inc., supra*, without viewpoint discrimination in an unprecedented statutory strategy. If the theory of this ordinance is to be resolved on the merits in this abstract posture, it raises novel issues which require the full attention of this Court.

The harm of pornography is the harm of sex inequality. (App. A, A-11, A-12) By accepting this harm but holding that "any rationale we could imagine in support of this ordinance could not be limited to sex discrimination," (App. A, A-17), the Court of Appeals ruled that pornography can not be legally restricted through the harm it does — because the harm it does, it does through gender. This is, so to speak, to discriminate against sex discrimination as a category of governmental interest.

If obscenity, far less concretely defined, can be constitutionally prohibited, if mere "indecent language," *F.C.C. v. Pacifica, supra*, can be constitutionally regulated, surely a "compelling state interest" of constitutional dimension such as sex equality, *Roberts v. U.S. Jaycees, supra*, stands on a comparable plane, given that even protected speech can be restricted where a compelling state interest exists. *Carey v. Brown*, 447 U.S. 455 (1980).

Eradicating gender discrimination is public policy. *Reed v. Reed*, 404 U.S. 71 (1971); *Los Angeles v. Manhart*, 435 U.S. 702 (1978). Both courts below assumed that the interest in eliminating sex discrimination can *never* outweigh a First Amendment interest. *Hishon v. King & Spaulding*, 104 S.Ct. 229 (1984), as well as *Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel.*, *supra*, and *Roberts v. U.S. Jaycees*, *supra*, are contrary and were not even mentioned. The Constitution grants no fundamental right to discriminate: "[i]nvidious private discrimination may be characterized as a form of exercising freedom . . . protected by the First Amendment, but it has never been accorded affirmative constitutional protection." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). If it is accepted that pornography is a practice of sex discrimination, then eradicating it constitutes a compelling state interest, potentially outweighing the First Amendment.

Rather than balancing the interests, the Ordinance was catagorically found not content neutral and thus invalid *per se*. In fact, the Ordinance combines content elements much like others that have been permitted, with noncontent elements, drawing lines on the basis of the specific harm it seeks to remedy. Content neutrality is not legally required, or *Young*, *Pacifica*, or *Ferber*, not to mention *Miller*, would not have become law. "The question of whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *Young v. American Mini Theatres*, 427 U.S. 50, 66 (1976). More recently in *Brockett v. City of Spokane*, this Court held that "prurient," when meaning abnormal ("i.e., lascivious"), but not normal ("i.e. lust"), erotic interest is not permitted in materials which, inter alia, include as content "violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture." 105 S.Ct. 2794, 2796-97 (1985). In the instant case, part of the relevant determination is whether, in the face of a clear record of harm (and separately assuming coercion, force, assault, or trafficking), a

legislature may constitutionally determine that it is unacceptable to eroticize sexual abuse when citizens are thereby subordinated on the basis of their sex.

The Ordinance is not a pure content restriction. First, the *definition* is not a pure content restriction. Of course it contains content terms, such as subsections (1)-(6), but then "falsely shouting fire in a theatre and causing a panic", *Schenck v. United States*, 249 U.S. 47, 52 (1919) contains "fire" as the content of its message. Any "mental intermediation" (App. A, A-12) is similarly physical and reflexive. Pornography is no more "mental" than obscenity, and obscenity is considered "not expression" at all. *Roth v. United States*, 354 U.S. at 492 (1957).

As the Court of Appeals glimpsed intermittently (*see, e.g.*, App. A, A-8, A-10), the definition states its harm in the active voice: pornography is the graphic sexually explicit *subordination* of women. To paraphrase, pornography is that sub-set of sexually explicit materials which subordinate women through pictures or words when certain concrete features are also present. Just as "a book about slavery is not itself slavery" (App. A, A-14), to express the idea of subordination is not to subordinate. Indeed, the City-County Council amended the definition, changing it from "sexually explicit subordination of women, graphically depicted" to "graphic sexually explicit subordination" to make just such a distinction.

To state the obvious, the burden of proving that materials at issue subordinate women, as opposed to merely expressing the idea that women are or ought to be subordinate, will rest with plaintiffs in real cases. It will be a defense that the materials merely express an *idea about* the subordination of women. Although many depictions and descriptions of a woman being subordinated will be found in actual cases to subordinate women, the Ordinance on its face does not make the mere depiction or description of a woman being subordinated actionable, even if the materials contain the rest of the definitional elements. The issue on *facial* review is whether materials that *do*

subordinate women, through their making or use, are nevertheless protected by the Constitution.

Having grasped that materials to be covered must subordinate women actively, the Court of Appeals did not sustain this recognition in its doctrinal discussion. The definition was treated as a restriction on an "idea." (App. A, A-9, A-10) An idea about subordination may be "a perspective an author adopts" (App. A, A-10) but an exploited woman is a human being, not an idea, and her actual subordination does not end at its conception. The Court of Appeals appears to believe that if materials that practice the subordination of women at the same time express an idea, they become *ipso facto* protected speech. Many activities, from pure verbal acts to mute assaults, express ideas and they do not therefore become protected speech. Just because a practice embodies a concept does not mean that it is not also a practice of that concept. A "Whites Only" sign expresses the idea that blacks are inferior to whites; it is also a practice of that idea. Admittedly, the idea may suffer if its practice is precluded, but this is because the idea that women are properly men's subordinates, like the idea that blacks are properly the subordinates of whites, relies for much of its effectiveness and credibility upon its practice. Segregating a community does not become protected speech because it expresses the idea that the races belong separate any more than punching a person in the face becomes protected speech because it delivers a point.

The Court of Appeals also ignored the fact that *nonspeech* elements must be present in any action brought under the Ordinance. *The definition is not in itself actionable*, nor is this a criminal law. Coercion, force, assault and trafficking are not ideas or mental intermediations. As this Court has observed, "Appellant was not prosecuted here for anything he said or believed, *but for what he did*, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books." *Mishkin v. New York*, 383 U.S. 502, 504-05 (1966). To say or believe is not to sell or

distribute. Nor is discrimination permitted because it is in business. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The Ordinance does not preclude discussion of topics or subject matter. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980). Speakers can continue to extol sexualized misogyny and the inevitability and joys of women's naturally second class civil status. They can argue that women's purpose on this planet is to be bought and sold for sexual use, as in pornography. Nor does the Ordinance restrict advocacy beyond *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Speakers can advocate sex inequality as the paradigm of sexual pleasure, promote subordination, urge rape, or incide sadism, subject to preexisting case law. What they may not do is practice coercion, force, assault or trafficking in localities that do not want women subjected by this means in their community.

The issue this ordinance poses is whether harm that revolves around these words and pictures, harm that can only be reached through reaching them, is placed beyond a jurisdiction's grasp because it is words and pictures it revolves around. If a medium through which harm is done is words and pictures, does it remain protected by virtue of the fact that, because it is words and pictures, it delivers much of its harm at the same time it delivers its message? In *Los Angeles v. Taxpayers for Vincent*, this Court upheld a regulation against posting signs where the adverse impact of the speech, "visual blight," is "not merely a possible by-product of the activity, but is created by the medium of expression itself." 104 S.Ct. 2118, 2132 (1984).

Pornography is inextricably interwoven with crimes such as rape, battery, sexual abuse of children, and pimping. *People v. Souiter*, 178 Cal. Rptr. 111 (Cal. Ct. App. 1981) (paying for sex to make pornography of it is pandering). Even First Amendment absolutist Justice Douglas thought that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded

with illegal action as to be an inseparable part of it." *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting). These acts are so inseparable from this industry that it cannot exist without them.

C. The Ordinance Does Not Discriminate On The Basis Of Viewpoint.

Raising the issue for the first time in this litigation, the Court of Appeals invalidated this Ordinance by invalidating its definition of pornography as a discrimination on the basis of viewpoint. The definition was faulted for restricting only sexually explicit materials that present a view of women and of sex that favors inequality, while permitting sex inequality to be favored through other than sexually explicit means, and permitting sexually explicit materials that favored sex equality. The Court of Appeals misconstrued the Ordinance on its face and misapplied the law on viewpoint discrimination.

The law against viewpoint discrimination derives from the intersection between the Equal Protection clause — to further the principles of which is also the aim of this law against pornography — and the First Amendment. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). Cases on viewpoint discrimination typically treat statutes that restrict which speakers may have access to a forum, to see if the restriction is based on their angle of vision or political position. *See, e.g., Perry Education Assn. v. Perry Local Educators' Assn.*, 103 S.Ct. 948 (1983). This ordinance restricts nothing based on who the speaker is. It defines pornography on the basis of what it does, and then empowers those who are injured through it in specified ways to sue.

Only if pornography is protected speech do Appellants have to justify its restriction against a charge of discrimination on the basis of viewpoint at all. The Court of Appeals took closer to the inverse approach: because the Ordinance discriminates on the basis of viewpoint, the materials it covers are protected speech. The panel

proceeds as though this were an ordinance making actionable coercion into films that are critical of Republicans but not those critical of Democrats. (App. A, A-16) It is not that pornography presents a one-sided argument in favor of the inequality of the sexes — which it certainly does — that supports Appellants' interest in its elimination. Rather, when graphic sexually explicit materials actively subordinate on the basis of sex in one of five contexts in one of four ways, those who practice that inequality can be held accountable for it.

Materials which are not constitutionally protected because of the harm they do, do not become protected because they serve as a vehicle for a viewpoint. The law making the production and distribution of child pornography a crime does not become invalid because child pornography takes the *view* that sex between adults and children is liberating and educational for the child. Nor is the statute in *Ferber* invalid because it takes the view that child pornography is child abuse. Indeed, the *Ferber* statute is not neutral in the sense the Seventh Circuit requires here, since it covers only children, while the Ordinance under review covers adults (both sexes) as well as children. Laws against advocacy of violent overthrow of the government, *see Brandenburg v. Ohio, supra*, are not invalid discriminations on the basis of viewpoint because they do not also prohibit advocacy to preserve the government or advocacy of peaceful change. The local sex discrimination ordinance validated in *Pittsburgh Press* did not violate the First Amendment because sex-segregated ads *express the view* that the workplace should be segregated by sex, nor was the law invalid because it legislated an "approved view" (App. A, A-10) of the place of the sexes in the workforce. Laws against harms through speech are not considered permissible by virtue of their viewpoint neutrality, but because the unrestricted speech does not do the damage. Harmful acts committed through speech do not become protected as speech simply because they communicate a point of view as they inflict an injury.

> Acts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent — *wholly apart from the point of view that such conduct may transmit.* Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

Roberts v. U.S. Jaycees, 104 S.Ct. 3244, 3255 (1984) (emphasis added).

The Ordinance is not a viewpoint discrimination for two additional reasons. First, coercion, force, assault, and trafficking are, to dignify them, "a means of promoting a viewpoint, not a viewpoint in itself." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S.Ct. 3439, 3454 (1985). Second, there are no facts showing that appellants were "impermissibly movitated by a desire to suppress a particular point of view." *Id.; Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Such a conclusion rests on findings of *fact*. The District Court found none; the Court of Appeals adduces none.

The Seventh Circuit misconstrued the foundation of this ordinance: it is based on a harm theory, not a viewpoint theory. Materials not covered may embody the same viewpoint, but they do not do the same harm. What is sex discrimination under the Ordinance is apparently viewpoint discrimination to this Court of Appeals. The Ordinance only "discriminates" between materials that do this damage and materials that do not — or do less or other damage or do it less directly.

Only by its refusal to look at the actual material the Ordinance covers in light of applicable precedent, and by minimizing its record of atrocities, can the Court of Appeals hold that, as a matter of Constitutional law, Appellants are precluded from taking sides on the question of eroticized violence against women. Given that this Ordinance does not make mere views actionable, there is no law that government must remain neutral while its citizens

are abused. Whatever one's economic views, the "marketplace of ideas", *see Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), was intended as metaphor. The Constitution was as much written, and has been as often interpreted, to impower the vulnerable against the excesses of power of the powerful. *See, e.g., U.S. v. Darby*, 312 U.S. 100 (1941). Even in *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), in which a group libel statute was given no effect, the Seventh Circuit noted: "It bears noting that we are *not* viewing here *a law which prohibits action designed to imped the equal exercise of guranteed rights* . . .or even a conspiracy to harass or intimidate others and subject them thus to racial or religious hatred. *See Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting). If we were, we would have a very different case." *Collin v. Smith*, 578 F.2d at 1204 n.13 (emphasis added). The City seeks full review of such a case here.

* * *

The Court of Appeals turned a compelling state interest into a prohibited viewpoint, acts into ideas, concrete harms into thoughts, and this society's commitment to equality under law into a free market argument for social Darwinism. Yet Appellants found, and the appeals court specifically did not disturb, evidence of the unique relation of pornography to sex-based inequality. From the Court of Appeals' decision, it appears that the instant case is sex discrimination's analogue to *Dred Scott v. Sanford*, 60 U.S. 393 (1857). There, it was found more important to the U.S. Constitution to require Negroes to be slaves than it was to permit a legislature to recognize their full citizenship, including their right to sue. Here, the Court of Appeals has determined that women can be raped and battered and tortured, "bought and sold, and treated as an ordinary article of merchandisé and traffic, whenever a profit could be made by it," *id.* at 407 (Taney, J. for the Court), and the industry that concededly requires and profits from this predation is more important to the U.S. Constitution than they are. The City-County Council sought only to recognize

women as full citizens by permitting them to hold accountable those who relegate them to inferiority. It means nothing other than that women are still regarded as "beings of an inferior order," *id.* at 407, for a court to admit every step in this argument except the conclusion that something should be done about it.

II. There is no Article III "case or controversy" between the present parties.

Appellees are plaintiff organizations which represent legitimate publishers, distributors, and sellers of books, magazines, newspapers, and films, and one consumer. They allege that the enactment of the Ordinance means that "the rights and other legal relations to the [appellees] will be affected...." (Second Amended Complaint, ¶5) The Seventh Circuit, citing *Buckley v. Valeo*, 424 U.S. 1, 11-12 and n.10 (1976), held that because appellees "are directly affected by the ordinance," (App. A, A-7) they may sue the City that passed it. Neither this Court nor any appellate court has ever countenanced a pre-enforcement challenge to a state law in such an abstract and conjectural posture. Such a major lowering of this federal jurisdictional threshhold requires plenary review.

Article III courts exist to resolve "cases or controversies," not to issue advisory opinions. This Court therefore requires actual injury, so that "the legal questions presented...will be resolved, *not in the rarified atmosphere of a debating society*, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added). Plaintiffs must allege a "personal stake" in the outcome, meaning they must have "suffered 'some threatened or actual injury resulting from the putatively illegal action....'" *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

Warth is closely aligned to the instant case. Various organizations and individuals challenged a town zoning ordinance on First Amendment grounds. Although plaintiffs alleged that the town board had committed various illegal acts under the ordinance, none of those acts had ever been directed at plaintiffs. The ordinance was never applied to plaintiffs, nor had plaintiffs been denied building permits or variances under the ordinance. In as much as the individual plaintiffs in *Warth* failed to demonstrate how they personally had been injured, and the organizational plaintiffs failed to show that any of their members were suffering immediate or threatened injury, this Court declined to confer standing.

Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979), set forth the particulars that a plaintiff must allege in a pre-enforcement challenge to a statute. While acknowledging that a plaintiff need not wait until he has actually been prosecuted under a law before challenging it, the Court firmly provided as a minimum requirement that

> [a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement[,]

id. at 298,

> and plaintiff must allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder....

Id.

Recognizing the special value and sensitivity of First Amendment rights, the requirements of actual injury and personal stake are sometimes modified, including in advance adjudications. The doctrine of procedural overbreadth has been fashioned to permit a plaintiff to raise the interests of third parties who are not before the

court — parties whose speech will be stilled if the law is applied, such that a real context for examining its validity may never arise. *Broaderick v. Oklahoma*, 413 U.S. 601 (1973). However, Appellees did not raise the interests of others, only their own.[5]

More importantly, Appellees did not allege that they have suffered any actual or threatened injury or threat of prosecution as a result of the Ordinance. There was no factual nexus whatsoever between Appellees and Appellants, e.g., threats in written or verbal communications.

Appellees allege no intent to traffick in pornography, coerce anyone into performing for it or intent to assault someone because of it. Appellees allege no intent to produce, distribute or sell pornography which is the product of coercion or will be used in an assault. Appellees do not allege an intent to force pornography on any person, and they cannot claim injury by a third party's forcing complaint because it can only be filed against the perpetrator. Appellees do not even allege, contrary to the Seventh Circuit's statement, that they "make, sell or read just about every kind of material that could be affected by the ordinance." (App. A, A-7)

The one consumer plaintiff does not allege an interest in reading material produced by coercion or causing assault. To allege that one is a "reader and viewer of First Amendment-protected material" (Second Amended Complaint, ¶5) is to plead not a fact, but a conclusion of law. As support for standing, the allegation is circular with respect to the merits.[6]

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[5] In this regard, the Seventh Circuit did find that the special overbreadth standing rules do not apply to Appellees. (App. A, A-7)

[6] Alleged vagueness also cannot be used to bootstrap standing. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497 n. 9 (1982). The Seventh Circuit did not find the ordinance vague. ("This statute . . . is all too clear." (App. A, A-8))

Appellees come neither under the usual rules of pre-enforcement standing, *Babbitt v. United Farm Workers National Union*, *supra*, nor under the relaxed First Amendment exceptions. *Broadrick v. Oklahoma*, *supra*. The Seventh Circuit, reading *Buckley v. Valeo*, 424 U.S. 1 (1976), to allow suit on the mere allegation of direct effect, reduced standing to a subjective hypothesis of future impact. *Buckley* is distinguishable. Congress, in the Federal Election Campaign Act of 1971, expressly provided for judicial review of constitutionality. *Id.* 424 U.S. at 11-12. This review extended to some of the plaintiffs, *see id.* 424 U.S. at 8 n.4, and appeared to weigh in the finding of standing. Further, "the complaint discloses that at least some of the appellants have a sufficient personal stake in...each challenged provision" to gain specific relief from a conclusive decree. *Id.* 424 U.S. at 12. Plaintiffs in *Buckley* indisputably would not have been able to give or receive certain campaign funds because of the Act. The case at bar, by contrast, requests "an opinion advising what the law would be upon a hypothetical state of facts." *Id.* 424 at 12.

An admittedly extraordinary line of cases have permitted suits in certain contexts by those whom a law, on its face, names, e.g., state employees, *Broaderick v. Oklahoma*, *supra*, prison inmates, *Procunier v. Martinez*, 416 U.S. 396 (1976), or teachers, *National Gay Task Force v. Oklahoma*, 729 F.2d 1270, *aff'd on equally divided vote*, 105 S.Ct. 1858 (1985). The instant ordinance does not single out any category of person for exclusive application; it instead makes actionable harms by anyone. Moreover, in the cases cited, the laws were criminal or disciplinary and prohibitory such that enforcement was nearly ministerial. Here, by distinction, Appellants have made certain practices civilly actionable so that private citizens may choose to bring complaints to it

The Seventh Circuit's ruling conflicts with clear law in other circuits. The Ninth Circuit holds that "the mere existence of a statute, which may or may not ever be applied

to plaintiffs, is not sufficient to create a case or controversy...." *Stoianoff v. State of Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983) (challenge to advertising prohibition). Because a plaintiff did show "that he was seriously interested in subjecting himself to...the challenged measure," that same court found a case or controversy in a challenge to a city council's procedural rule. *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1351 (9th Cir. 1984). The Fifth Circuit found a case or controversy because a plaintiff who challenged a ban on outdoor advertising alleged a desire to engage in it and had in fact lost expected revenue due to the law. *LaMar Outdoor Advertising v. Mississippi State Tax Commission*, 701 F.2d 314 (5th Cir. 1983).

The only injury Appellees claim besides being "affected" by the existence of the Ordinance is that the Ordinance is a "threat." (Second Amended Complaint, ¶11) These allegations amount to no more than a "chilling effect" on their First Amendment rights which alone has never been sufficient to establish standing for a moving party. In *Younger v. Harris*, 401 U.S. 37, 41-42 (1971), allegations that plaintiffs "felt inhibited" in the exercise of their First Amendment rights because of the existence of the California Criminal Syndicalism Act were found insufficient. In *Laird v. Tatum*, 408 U.S. 1 (1972), the Supreme Court denied standing when the existence of a government investigative activity was alleged to chill constitutional rights. Any chill was perceptual not factual. *See also United Public Workers of America v. Mitchell*, 330 U.S. 75 (1946).

The Courts of Appeals have followed suit. The Court of Appeals for the District of Columbia recently clarified that it is only in the area of First Amendment overbreadth challenges that "chilling effect" has anything to do with standing. In *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), plaintiffs alleging a chilling effect on their First Amendment rights and an immediate threat of being targeted for surveillance under an

executive order regulating intelligence activities were found not to have alleged any specific action, threatened or contemplated. As the instant case presents a similar lack, the D.C. Circuit's criticism applies: "[c]hilling effect is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitled the plaintiff to challenge it." *Id.* at 1378 (emphasis supplied). *See also Lecci v. Cahn*, 493 F.2d 826 (2nd Cir. 1974).

Lacking an allegation of objective and personal actual or immediately threatened harm, this case excludes all those whose interests are truly at stake in it: pornographers, their customers, and their victims. This eight billion dollar per year industry shows no sign of disappearing — nor do its victims, who are eager, indeed desperate, to seek relief. Yet the bare assertion that someone's interests are "affected" has excluded those harmed, staying the law while hypothetical possibilities are debated, and has given foundation to threats of expensive lawsuits against localities *for merely passing a civil rights law*. This Court must examine an alteration in federal jurisdiction of such scope and consequence.

III. The Court of Appeals should have granted abstention.[7]

The courts below erred in failing to abstain from adjudicating the merits of the Ordinance prior to authoritative construction by the Indiana courts. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) and its progeny counsel federal restraint in deciding constitutional challenges to local enactments susceptible to state judicial construction that would avoid or modify the need to reach the federal constitutional issues. *Id.*; *e.g.*, *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321 (1984).

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[7] Appellants *did* urge abstention at oral argument before the Seventh Circuit.

The Ordinance presents novel and unsettled questions of state law, the threshhold of *Pullman* abstention. Neither the definition, the causes of action, nor the procedures have ever been construed. The present action was begun before the law could go into effect, a consideration that has favored abstention. *Bellotti v. Baird*, 428 U.S. 132 (1976). No existing law suggests, far less compels, the full interpretation the Indiana Supreme Court would give it. *Compare Kusper v. Pontikes*, 414 U.S. 51 (1973), *with Bellotti*, 428 U.S. at 147-148. As the present litigation suggests, the meaning of the Ordinance's key provisions can not be regarded as settled as a matter of state law.

A state construction could eliminate or modify the federal constitutional questions. The Seventh Circuit denied abstention because "it is the structure of the statute rather than the meaning of any of its terms that leads to the constitutional problem." (App. A, A-9) "Structure" apparently means that all the causes of action field the definition. The definition was considered viewpoint discrimination. But the *meaning of the terms* were the only source mentioned for this problem. Interpretation could have eliminated this difficulty, such that the "structure" of the ordinance would be no problem. Instead, the Seventh Circuit utterly disregarded the local interests in reducing sex discrimination which motivated the enactment.

Concerns for potential First Amendment interests should not defeat abstention either. The district court's injunction need not be dissolved pending the ultimate resolution of the issues in state court under a stay.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Supreme Court, U.S.
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No. 85-1090

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, Indiana, et al.,

Appellants

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-3147

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

v.

WILLIAM H. HUDNUT, III, Mayor, City of Indianapolis, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 84 C 791 — **Sarah Evans Barker**, *Judge.*

ARGUED JUNE 4, 1985 — DECIDED AUGUST 27, 1985

Before CUDAHY AND EASTERBROOK, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* Indianapolis enacted an ordinance defining "pornography" as a practice that discriminates against women. "Pornography" is to be redressed through the administrative and judicial methods used for other discrimination. The City's definition of "pornography" is considerably different from "obscenity," which the Supreme Court has held is not protected by the First Amendment.

To be "obscene" under *Miller v. California*, 413 U.S. 15 (1973), "a publication must, taken as a whole, appeal to the

prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2800 (1985). Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than "normal, healthy sexual desires" (*Brockett, supra*, at 2799) are essential elements of "obscenity."

"Pornography" under the ordinance is "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented as being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

Indianapolis Code §16-3(q). The statute provides that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." The ordinance as passed in April 1984 defined "sexually explicit" to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined.

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, "if a woman is subjected, why should it matter that the work has other value?" Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rts. — Civ. Lib. L. Rev. 1, 21 (1985).

Civil rights groups and feminists have entered this case as amici on both sides. Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce's *Ulysses* to Homer's *Iliad*; both depict women as submissive objects for conquest and domination.

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way — in sexual encounters "premised on equality" (MacKinnon, *supra*, at 22) — is lawful no matter how sexually explicit. Speech treating women in the disapproved way — as submissive in matters sexual or as enjoying humiliation — is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

I

The ordinance contains four prohibitions. People may not "traffic" in pornography, "coerce" others into performing in pornographic works, or "force" pornography on anyone. Anyone injured by someone who has seen or read pornography has the right of action against the maker or seller.

Trafficking is defined in §16-3(g)(4) as the "production, sale, exhibition, or distribution of pornography." The offense excludes exhibition in a public or educational library, but a "special display" in a library may be sex discrimination. Section 16-3(g)(4)(C) provides that the trafficking paragraph "shall not be construed to make isolated passages or isolated parts actionable."

"Coercion into pornographic performance" is defined in §16-3(g)(5) as "[c]oercing, intiminating or fradulently inducing any person ... into performing for pornography...." The ordinance specifies that proof of any of the following "shall not constitute a defense: I. That the person is a woman; ... VI. That the person has previously posed for sexually explicit pictures ... with anyone ...; ... VIII. That the person actually consented to a use of the per-

formance that is changed into pornography; . . . IX. That the person knew that the purpose of the acts or events in question was to make pornography; . . . XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; XII. That no physical force, threats, or weapons were used in the making of the pornography; or XIII. That the person was paid or otherwise compensated."

"Forcing pornography on a person," according to §16-3(g)(5), is the "forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place." The statute does not define forcing, but one of its authors states that the definition reaches pornography shown to medical students as part of their education or given to language students for translation. MacKinnon, *supra*, at 40-41.

Section 16-3(g)(7) defines as a prohibited practice the "assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography."

For purposes of all four offense, it is generally "not . . . a defense that the respondent did not know or intend that the materials were pornography . . . ." Section 16-3(g)(8). But the ordinance provides that damages are unavailable in trafficking cases unless the complainant proves "that the respondent knew or had reason to know that the materials were pornography." It is a complete defense to a trafficking case that all of the materials in question were pornography only by virtue of category (6) of the definition of pornography. In cases of assault caused by pornography, those who seek damages from "a seller, exhibitor or distributor" must show that the defendant knew or had reason to know of the material's status as pornography. By implication, those who seek damages from an author need not show this.

A woman aggrieved by trafficking in pornography may file a complaint "as a woman acting against the subordination of women" with the office of equal opportunity. Section 16-17(b). A man, child, or transsexual also may protest trafficking "but must prove injury in the same way that a woman is injured...." *Ibid.* Subsection (a) also provides, however, that "any person claiming to be aggrieved" by trafficking, coercion, forcing, or assault may complain against the "perpetrators." We need not decide whether §16-17(b) qualifies the right of action in §16-17(a).

The office investigates and within 30 days makes a recommendation to a panel of the equal opportunity advisory board. The panel then decides whether there is reasonable cause to proceed (§16-24(2)) and may refer the dispute to a conciliation conference or to a complaint adjudication committee for a hearing (§§16-24(3), 16-26(a)). The committee uses the same procedures ordinarily associated with civil rights litigation. It may make findings and enter orders, including both orders to cease and desist and orders "to take further affirmative action ... including but not limited to the power to restore complainant's losses...." Section 16-26(d). Either party may appeal the committee's decision to the board, which reviews the record before the committee and may modify its decision.

Under Indiana law an administrative decision takes effect when rendered, unless a court issues a stay. Ind. Stat. §4-22-1-13. The Board's decisions are subject to review in the ordinary course. Ind. Stat. §4-22-1-14. Judicial review in pornography cases is to be de novo, Indianapolis Code §16-27(e), which provides a second complete hearing. When the board finds that a person has engaged in trafficking or that a seller, exhibitor, or distributor is responsible for an assault, it must initiate judicial review of its own decision, *ibid.*, and the statute prohibits injunctive relief in these cases in advance of the court's final decision. (This is unlike the usual procedure under state law, which permits

summary enforcement. Ind. Stat. §§4-22-1-18 and 4-22-1-27.)

The district court held the ordinance unconstitutional. 598 F. Supp. 1316 (S.D. Ind. 1984). The court concluded that the ordinance regulates speech rather than the conduct involved in making pornography. The regulation of speech could be justified, the court thought, only by a compelling interest in reducing sex discrimination, an interest Indianapolis had not established. The ordinance is also vague and overbroad, the court believed, and establishes a prior restraint of speech.

II

The plaintiffs are a congeries of distributors and readers of books, magazines, and films. The American Booksellers Association comprises about 5,200 bookstores and chains. The Association for American Publishers includes most of the country's publishers. Video Shack, Inc., sells and rents video cassettes in Indianapolis. Kelly Bentley, a resident of Indianapolis, reads books and watches films. There are many more plaintiffs. Collectively the plaintiffs (or their members, whose interests they represent) make, sell, or read just about every kind of material that could be affected by the ordinance, from hard-core films to W.B. Yeats's poem "Leda and the Swan" (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda), to the collected works of James Joyce, D.H. Lawrence, and John Cleland.

The interests of Bentley and many of the members of the organizational plaintiffs are directly affected by the ordinance, which gives them standing to attack it. *Buckley v. Valeo*, 424 U.S. 1, 11-12 & n.10 (1976). There is no need to invoke the special standing rules applicable to overbroad laws that affect speech, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); Henry P. Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1.

The district court prevented the ordinance from taking effect. The expedition with which this suit was filed raises questions of ripeness and abstention. Ripeness is a prudential question, see *Buckley, supra*, 424 U.S. at 113-18; *Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3332-34 (1985). A case is not ripe if the issues are still poorly formed or the application of the statute is uncertain. A challenge may be ripe, however, even when the statute is not yet effective. *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). The statute challenged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), had an effective date two years in the future, yet the Court found the suite ripe. Here, as in *Pierce*, the dispute may be resolved without reference to the administration of the statute. We gain nothing by waiting. Time would take a toll, however, on the speech of the parties subject to the act. They must take special care not to release material that might be deemed pornographic, for that material could lead to awards of damages. Deferred adjudication would produce tempered speech without assisting in resolution of the controversy.

It is also inappropriate to abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). Abstention is appropriate when state courts may clarify the meaning of a statute, thus sharpening the constitutional dispute and perhaps preventing an unnecessary constitutional adjudication. This statute, however, is all too clear. Cf. *Mazanec v. North Judson — San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985). A state court could not construe this ordinance as an "ordinary" obscenity law; another law serves that function. Ind. Stat. §35-49-1-1 et seq. It is designed to be distinctively different, to prohibit explicitly sexual speech that "subordinates" women in specified ways. If abstention was unnecessary in *Brockett*, despite the argument (which convinced the Chief Justice and Justices Rehnquist and O'Connor, see 105 S. Ct. at 2804-05) that a state court could save the statute by excising

or construing a single element of the definition of obscenity, it surely is unnecessary here, for it is the structure of the statute rather than the meaning of any one of its terms that leads to the constitutional problem.

III

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious — the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Communists may speak freely and run for office. *DeJonge v. Oregon*, 299 U.S. 353 (1937). The Nazi Party may march through a city with a large Jewish population. *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). People may criticize the President by misrepresenting his positions, and they have a right to post their misrepresentations on public property. *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984) (Bork, J.). People may teach religions that others despise. People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because

"above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas...." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). See also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 William & Mary L. Rev. 189 (1983); Paul B. Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 233-36 (1982).

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance.[1] It does not per-

[1] "Pornography constructs what a woman is in terms of its view of what men want sexually.... Pornography's world of equality is a harmonious and balanced place. Men and women are perfectly complementary and perfectly bipolar. ... All the ways men love to take and violate women, women love to be taken and violated. ... What pornography *does* goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its

(Footnote continued on following page)

suade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenents of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home,

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(Footnote continued from preceeding page)

working. . . . [P]ornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise neutral and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social construction of male and female. . . . Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography . . . is a sexual reality." MacKinnon, *supra*, at 17-18 (note omitted, emphasis in original). See also Andrea Dworkin, *Pornography: Men Possessing Women* (1981). A national commission in Canada recently adopted a similar rationale for controlling pornography. Special Commission on Pornography and Prostitution, 1 *Pornography and Prostitution in Canada* 49-59 (Canadian Government Publishing Centre 1985).

batter and rape on the streets.[2] In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]." Indianapolis Code §16-1(a)(2).

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a *Manifesto* by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government. Religions affect socialization in

[2] MacKinnon's article collects empirical work that supports this proposition. The social science studies are very difficult to interpret, however, and they conflict. Because much of the effect of speech comes through a process of socialization, it is difficult to measure incremental benefits and injuries caused by particular speech. Several psychologists have found, for example, that those who see violent, sexually explicit films tend to have more violent thoughts. But how often does this lead to actual violence? National commissions on obscenity here, in the United Kingdom, and in Canada have found that it is not possible to demonstrate a direct link between obscenity and rape or exhibitionism. The several opinions in *Miller v. California* discuss the U.S. commission. See also *Report of the Committee on Obscenity and Film Censorship* 61-95 (Home Office, Her Majesty's Stationary Office, 1979); Special Committee on Pornography and Prostitution, 1 *Pornography and Prostitution in Canada* 71-73, 95-103 (Canadian Government Publishing Centre 1985). In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions. See *Gregg v. Georgia*, 428 U.S. 153, 184-87 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

the most pervasive way. The opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), shows how a religion can dominate an entire approach to life, governing much more than the relation between the sexes. Many people believe that the existence of television, apart from the content of specific programs, leads to intellectual laziness, to a penchant for violence, to many other ills. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution — a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); cf. *Brandenburg v. Ohio, supra; New York Times Co. v. United States*, 403 U.S. 713 (1971).

Racial bigotry, anti-semitism, violence on television, reporters' biases — these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process

of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by red-hot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the "subordination" of women. As we discuss in Part IV, a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.

The more immediate point, however, is that the image of pain is not necessarily pain. In *Body Double*, a suspense film directed by Brian DePalma, a woman who has disrobed and presented a sexually explicit display is murdered by an intruder with a drill. The drill runs through the woman's body. The film is sexually explicit and a murder occurs — yet no one believes that the actress suffered pain or died. In *Barbarella* a character played by Jane Fonda is at times displayed in sexually explicit ways and at times shown "bleeding, bruised, [and] hurt in a context that makes these conditions sexual" — and again no one believes that Fonda was actually tortured to make the film. In *Carnal Knowledge* a woman grovels to please the sexual whims of a character played by Jack Nicholson; no one believes that there was a real sexual submission, and the Supreme Court held the film protected by the First Amendment. *Jenkins v. Georgia*, 418 U.S. 153 (1974). And this works both ways. The description of women's sexual domination of men in *Lysistrata* was not real dominance. Depictions may affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.

Much of Indianapolis's argument rests on the belief that when speech is "unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First

Amendment does not apply either. The metaphor is honored; Milton's *Aeropagitica* and John Stewart Mill's *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever "excluded" from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.

The Supreme Court has rejected the position that speech must be "effectively answerable" to be protected by the Constitution. For example, in *Buckley v. Valeo, supra*, 424 U.S. at 39-54, the Court held unconstitutional limitations on expenditures that were neutral with regard to the speakers' opinions and designed to make it easier for one person to answer another's speech. See also *FEC v. National Conservative PAC*, 105 S. Ct. 1459 (1985). In *Mills v.*

Alabama, 384 U.S. 214 (1966), the Court held unconstitutional a statute prohibiting editorials on election day — a statute the state had designed to prevent speech that came too late for answer. In cases from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), through *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court has held that the First Amendment protects political stratagems — obtaining legislation through underhanded ploys and outright fraud in *Noerr*, obtaining political and economic ends through boycotts in *Claiborne Hardware* — that may be beyond effective correction through more speech.

We come, finally, to the argument that pornography is "low value" speech, that it is enough like obscenity that Indianapolis may prohibit it. Some cases hold that speech far removed from politics and other subjects at the core of the Framers' concerns may be subjected to special regulation. E.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67-70 (1976) (plurality opinion); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). These cases do not sustain statutes that select among viewpoints, however. In *Pacifica* the FCC sought to keep vile language off the air during certain times. The Court held that it may; but the Court would not have sustained a regulation prohibiting scatalogical descriptions of Republicans but not scatological descriptions of Democrats, or any other form of selection among viewpoints. See *Planned Parenthood Ass'n v. Chicago Transit Authority*, No. 84-2518 (7th Cir. July 12, 1985), slip op. 13-14.

At all events, "pornography" is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low

value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance applies to graphic sexually explicit subordination in works great and small.[3] The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Strange Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978). Indianapolis has created an approved point of view and so loses the support of these cases.

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

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[3] Indianapolis briefly argues that *Beauharnais v. Illinois*, 343 U.S. 250 (1952), which allowed a state to penalize "group libel," supports the ordinance. In *Collin v. Smith*, *supra*, 578 F.2d at 1205, we concluded that cases such as *New York Times v. Sullivan* had so washed away the foundations of *Beauharnais* that it could not be considered authoritative. If we are wrong in this, however, the case still does not support the ordinance. It is not clear that depicting women as subordinate in sexually explicit ways, even combined with a depiction of pleasure in rape, would fit within the definition of a group libel. The well received film *Swept Away* used explicit sex, plus taking pleasure in rape, to make a political statement, not to defame. Work must be an insult or slur for its own sake to come within the ambit of *Beauharnais*, and a work need not be scurrilous at all to be "pornography" under the ordinance.

IV

The definition of "pornography" is unconstitutional. No construction or excision of particular terms could save it. The offense of trafficking in pornography necessarily falls with the definition. We express no view on the district court's conclusions that the ordinance is vague and that it establishes a prior restraint. Neither is necessary to our judgment. We also express no view on the argument presented by several amici that the ordinance is itself a form of discrimination on account of sex.

Section 8 of the ordinance is a strong severability clause, and Indianapolis asks that we parse the ordinance to save what we can. If a court could do this by surgical excision, this might be possible. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir. 1985). But a federal court may not completely reconstruct a local ordinance, and we conclude that nothing short of rewriting could save anything.

The offense of coercion to engage in a pornographic performance, for example, has elements that might be constitutional. Without question a state may prohibit fraud, trickery, or the use of force to induce people to perform — in pornographic films or in any other films. Such a statute may be written without regard to the viewpoint depicted in the work. *New York v. Ferber*, 458 U.S. 747 (1982), suggests that when a state has a strong interest in forbidding the conduct that makes up a film (in *Ferber* sexual acts involving minors), it may restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct. A state may apply such a rule to non-sexual coercion (although it need not). We suppose that if someone forced a prominent political figure, at gunpoint, to endorse a candidate for office, a state could forbid the commercial sale of the film containing that coerced endorsement. The same principal allows a court to enjoin the publication of stolen trade secrets and award damages for the publication of copyrighted matter without permission. See *Harper & Row, Publishers, Inc. v. Nation*

Enterprises, 105 S. Ct. 2218 (1985). Cf. *Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980).

But the Indianapolis ordinance, unlike our hypothetical statute, is not neutral with respect to viewpoint. The ban on distribution of works containing coerced performances is limited to pornography; coercion is irrelevant if the work is not "pornography," and we have held the definition of "pornography" to be defective root and branch. A legislature might replace "pornography" in §16-3(g)(4) with "any film containing explicit sex" or some similar expression, but even the broadest severability clause does not permit a federal court to rewrite as opposed to excise. Rewriting is work for the legislature of Indianapolis. Cf. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Califano v. Westcott*, 443 U.S. 76 (1979).

The offense of forcing pornography on unwilling recipients is harder to assess. Many kinds of forcing (such as giving texts to students for translation) may themselves be protected speech. *Rowan v. Post Office*, 397 U.S. 728 (1970), shows that a state may permit people to insulate themselves from categories of speech — in *Rowan* sexual mail — but that the government must leave the decision about what items are forbidden in the hands of the potentially offended recipients. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (the government may not define for itself a category of constitutionally protected but sexual speech that may not be mailed). Exposure to sex is not something the government may prevent, see *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). We therefore could not save the offense of "forcing" by redefining "pornography" as all sexually-offensive speech or some related category. The statute needs a definition of "forcing" that removes the government from the role of censor. See also *Planned Parenthood Ass'n, supra*, holding that the "captive audience" problem does not permit a government to discriminate on account of the speaker's message.

The section creating remedies for injuries and assaults attributable to pornography also is salvageable in principle, although not by us. The First Amendment does not prohibit redress of all injuries caused by speech. Injury to reputation is redressed through the law of libel, which is constitutional subject to strict limitations. Cases such as *Brandenburg v. Ohio* and *NAACP v. Claiborne Hardware* hold that a state may not penalize speech that does not cause immediate injury. But we do not doubt that if, immediately after the Klan's rally in *Brandenburg*, a mob had burned to the ground the house of a nearby black person, that person could have recovered damages from the speaker who whipped the crowd into a frenzy. All of the Justices assumed in *Claiborne Hardware* that if the threats in Charles Evers's incendiary speech had been a little less veiled and had led directly to an assault against a person shopping in a store owned by a white merchant, the victim of the assault and even the merchant could have recovered damages from the speaker.

The law of libel has the potential to muzzle the press, which led to *New York Times v. Sullivan*. See also *Ollman v. Evans*, 750 F.2d 970, 994-98 (D.C. Cir. 1984) (en banc) (Bork, J., concurring). A law awarding damages for assaults caused by speech also has the power to muzzle the press, and again courts would place careful limits on the scope of the right. Certainly no damages could be awarded unless the harm flowed directly from the speech and there was an element of intent on the part of the speaker, as in *Sullivan* and *Brandenburg*.

Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history. The constitutional requirements for a valid recovery for assault caused by

speech might turn out to be too rigorous for any plaintiff to meet.[4] But the Indianapolis ordinance requires the complainant to show that the attack was "directly caused by specific pornography" (§16-3(g)(7)), and it is not beyond the realm of possibility that a state court could construe this limitation in a way that would make the statute constitutional. We are not authorized to prevent the state from trying.

Again, however, the assault statute is tied to "pornography," and we cannot find a sensible way to repair the defect without seizing power that belongs elsewhere. Indianapolis might choose to have no ordinance if it cannot be limited to viewpoint-specific harms, or it might choose to extend the scope to all speech, just as the law of libel applies to all speech. An attempt to repair this ordinance would be nothing but a blind guess.

No amount of struggle with particular words and phrases in this ordinance can leave anything in effect. The district court came to the same conclusion. Its judgment is therefore

AFFIRMED

SWYGERT, *Senior Circuit Judge*, concurring. I concur in Parts I, II, and III of the court's opinion except for the following strictures. Although raised in the district court, neither ripeness nor abstention was made an issue on appeal. Given that fact, I believe both are pseudo-issues and this court need not treat them *sua sponte*. True, some of the intervenors have discussed abstention in their briefs; but we are without the benefit of the views of the real parties at interest in this case on either issue. More importantly, a discussion and resolution of these issues are quite unnecessary to the disposition of this appeal.

[4] See, e.g., *Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979), among the many cases concluding that particular plaintiffs could not show a connection sufficiently direct to permit liability consistent with the First Amendment.

I also believe that the majority's questionable and broad assertions regarding how human behavior can be conditioned by certain teachings and believes (*see ante* at 10-12, 13) are unnecessary. For even if this court accepts the City of Indianapolis' basic contention that pornography does condition unfavorable responses to women, the ordinance is still unconstitutional.

As to Part IV of the opinion, I agree that the ordinance is unconstitutional on first amendment grounds and that there is no need to discuss vagueness or prior restraint. I do, however, disassociate myself from the extensive statements with respect to how the Indianapolis City Council could fashion an ordinance dealing with pornography that might pass constitutional muster. Indianapolis has asked us to sever the ordinance and save those parts that are not unconstitutional, if we can. All then that this court is required to do is to rule that the ordinance is not severable. Statements regarding which portions of the ordinance may be constitutional are merely advisory and are not the function of this court.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.	)	
Plaintiffs,	)	
VS.	)	CAUSE NO. IP 84-791C
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al.	)	
Defendants.	)	

JUDGMENT

The Court, having this day filed its Findings of Fact and Conclusions of Law and its Memorandum in the above matter in the following words and figures, to-wit: (H. I.), now, therefore,

IT IS CONSIDERED AND ADJUDGED that Indianapolis City-County General Ordinances Nos. 24 and 35, amending the Human Relations and Equal Opportunity Law appearing in Chapter 16 of the Code of Indianapolis and Marion County, Indiana, are declared to be unconstitutional, void and of no effect.

IT IS FURTHER CONSIDERED AND ADJUDGED that defendants are permanently enjoined from enforcing said Ordinances.

IT IS FURTHER CONSIDERED AND ADJUDGED that judgment shall be entered for plaintiffs. Costs and

reasonable attorneys' fees are assessed against the defendants.

Dated this 19th day of November, 1984.

/s/ Sarah Evans Barker

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.	)	
Plaintiffs,	)	
VS.	)	CAUSE NO. IP 84-791C
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al.	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court on the June 22, 1984 motion of the plaintiffs for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the issues of their June 20, 1984 second amended complaint and defendants' June 21, 1984 answer thereto. The motion became fully briefed with the filing of the movants' reply on July 11, 1984. Additionally, two *amicus curiae* were permitted to file briefs in this action. On July 30, 1984, oral arguments were presented to the Court, at which time defendants by oral motion recast their opposing brief into a cross-motion for summary judgment, which motion the Court granted.

Based upon the undisputed facts, the parties' and amicus briefs and oral argument of counsel, the Court now submits its findings of fact and conclusions of law. In accordance therewith, plaintiffs' motion for summary judgment is GRANTED and defendants' cross-motion for summary judgment is DENIED, and the challenged Ordinance is declared to be unconstitutional.

Findings of Fact

1. On April 23, 1984, and June 11, 1984, the Indianapolis-Marion County City-County Council (hereinafter "Council") passed General Ordinances No. 24, 1984 and 35, 1984, respectively, which amended the Code of Indianapolis and Marion County, Indiana, Chapter 16, "Human Relations and Equal Opportunity" (hereinafter "the Ordinance"). The original Ordinance was signed into law by Indianapolis Mayor William H. Hudnut, III, on May 1, 1984, and the amendments thereto on June 15, 1984.

2. The plaintiff, American Booksellers Association, Inc., is a trade association composed of booksellers located throughout the United States. The Association has approximately 5,200 members, consisting of private bookstores, department store bookstores, and chain bookstores, some of which are located in Indianapolis.

3. The plaintiff, Association for American Publishers Inc., is a trade association organized under the laws of the State of New York. It is the major national association of publishers of general books, textbooks and educational materials in the United States. Its members publish the vast majority of all general, educational, and religious books and materials produced in the United States, which are sold and distributed in book stores, department stores, drug stores, news-stands and other outlets throughout the United States, some of which are in Indianapolis. The Association has in excess of 300 members, virtually all of which publish materials sold in Indianapolis.

4. The plaintiff, Council for Periodical Distributors Associations, is a national trade association, having over 500 independent, local wholesale distributors of magazines, comic books, paperback books and newspapers, some of which are located or do business in Indianapolis.

5. The plaintiff, Freedom to Read Foundation, a nonprofit organization supported by voluntary donations, was established in 1969 by the American Library Association to

promote and defend First Amendment rights, to foster libraries as institutions wherein First Amendment freedoms are fulfilled, to support the right of libraries to include in their collections and make available any stock which they may legally acquire, and to seek legal precedents for the freedom to read on behalf of all citizens.

6. The plaintiff, International Periodical Distributors Association, Inc., is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

7. The plaintiff, Koch News Company, a partnership operating under the partnership laws of the State of Indiana, is the largest wholesale distributor in Indianapolis of periodicals, hardback books, paperback books, Bibles, school books and children's books.

8. The plaintiff, National Association of College Stores, Inc., is a trade association of college stores located throughout the United States. The Association has approximately 2,500 members, some of which are in Indianapolis.

9. The plaintiff Omega Satellite Products Co., a partnership operating under the partnership laws of the State of Indiana, is a distributor in Indianapolis of television programming received from satellite transmissions.

10. The plaintiff, Video Shack, Inc., is an Indiana corporation which sells and rents motion pictures and other programming on video cassettes at three retail locations in Indianapolis.

11. The plaintiff, Kelly Bentley, is an adult female resident and citizen of Indianapolis, and a reader and viewer of First Amendment protected material.

12. The defendants are the individual City-County officials responsible for enforcement and/or implementation of the Ordinance.

13. Public hearings were held by the Administrative Committee of the Council and by the Council in connection with the passage of the Ordinance at which testimony was given and exhibits were submitted.

14. The Council made the following findings of legislative fact, as set forth in the Ordinance as Section 16-1(a)(2):

> "Sec. 16-1. Findings, policies and purposes.
>
> (a) Findings. the City-County Council hereby makes the following findings:
>
> * * *
>
> (2) Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Poronography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods."

15. The stated purpose of the Ordinance is set forth in Section 16-1(b)(8), which provides:

> " (b) It is the purpose of this ordinance to carry out the following policies of the City of Indianapolis and Marion County:
>
> * * *
>
> (8) To prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography."

16. "Pornography" is defined in the Ordinance as follows:

> "(q) Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
>
> (1) women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abusement [sic], torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; and [sic]
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.
>
> The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section."

Section 16-3(q).

17. Section 16-15 of the Ordinance makes the following discriminatory practices unlawful:

> "(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.
>
> (A) City, state and federally funded public libraries or private and public university and college libraries in wich [sic] pornography is

available for study, including on open shelves, shall not be construed to be trafficking in pornography, but special display presentations of pornography in said places is sex discrimination.

(B) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

(C) This paragraph (4) shall not be construed to make isolated passages or isolated parts actionable.

(5) Coercion into a pornographic performance: coercing, intimidating or fraudulently inducing any person, including a man, transsexual, into performing for pornography, which injury may date from any appearance or sale of any product(s) of such performance.

(A) Proof of the following facts or conditions shall not constitute a defense:

I. That the person is a woman; or
II. That the person is or has been a prostitute; or
III. That the person has attained the age of majority; or
IV. That the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
V. That the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or
VI. That the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issues; or

VII. That anyone else, including a spouse or other relative, has given permission on the person's behalf; or

VIII. That the person actually consented to a use of the performance that is changed into pornography; or

IX. That the person knew that the purpose of the acts or events in question was to make pornography; or

X. That the person demonstrated no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or

XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or

XII. That no physical force, threats, or weapons were used in the making of the pornography; or

XIII. That the person was paid or otherwise compensated."

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography."

Section 16-3(g)(4)-(7).

22. Under the Ordinance, Section 16-3(g)(8), it is no defense to the discriminatory practices quoted in Finding 17 above that the respondent did not know or intend that the materials were pornography or sex discrimination, except where money damages are sought against respondent:

"(8)Defenses. Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6) or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of Section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of Section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of Section 16-3."

19. Section 16-17 of the Ordinance sets forth the grounds for filing a complaint, who may file, and the persons against whom a complaint may be filed:

" (a) A complaint charging that any person has engaged in or is engaging in a discriminatory practice prohibited by sections 16-14 and/or 16-15 may be filed with the office by any person claiming to be aggrieved by the practice, or by one or more members of the board or employees of the office who have reasonable cause to believe that a violation of sections 16-14 and 16-15 has occurred, in any of the following circumstances:

* * *

(6) In the cases of trafficing [sic] in pornography, coercion into pornographic performances, and assault or physical attack due to pornography (as provided in Section 16-3(g)(7)) against the perpetrator(s), maker(s), seller(s), exhibitor(s), or distributor(s).

(7) In the case of forcing pornography on a person, against the perpetrator(s) and/or institution.

(b) In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man,

child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to obtain relief under this chapter.

(c) In the case of assault or physical attack due to pornography, compensation for losses or an award for damages shall not be assessed against (1) maker(s), for pornography made, (2) distributor(s), for pornography distributed, (3) seller(s), for pornography sold, or (4) exhibitor(s) for pornography exhibited, prior to the effective date of this act."

20. Once a complaint alleging a discriminatory practice has been filed, the Ordinance provides for an investigation of the alleged unlawful practice, and for an informal conference in an effort to eliminate such practice if there is reasonable cause to believe that any violation has occurred:

"Sec. 16-24. Investigation and conciliation.

(1) Investigation. Within ten (10) working days after the receipt of a complaint filed pursuant to this chapter, the chief officer shall initiate an investigation of the alleged discriminatory practice charged in the complaint. All such investigations shall be made by the office at the direction of the chief officer and may include informal conferences or discussions with any party to the complaint for the purpose of obtaining additional information or attempting to resolve or eliminate the alleged discriminatory practice by conciliation or persuasion. The office shall have the authority to initiate discovery, including but not limited to interrogatories, request for production of documents and subpoenas, on approval of the chief officer at any time within ten (10) working days after filing of a complaint. Any request by the office to compel discovery may be by appropriate petition to the Marion County circuit or superior courts.

(2) Report of investigation; determination by panel. Unless the complaint has been satisfactorily resolved prior thereto, the chief officer shall, within thirty (30) working days after the date of filing of a

complaint pursuant to section 16-17, report the results of the investigation made pursuant to subsection (1) to a panel of three (3) members of the board designated by the chairperson or vice-chairperson or pursuant to the rules of the board, which panel shall not include any member of the board who initiated the complaint, who might have participated in the investigation of the complaint, or who is a member of the complaint adjudication committee. The chief officer shall make a recommendation as to whether there is reasonable cause to believe that the respondent has violated sections 16-14 and/or 16-15. The chairperson, vice-chairperson or such other member of the panel so designated, may, for good cause shown, extend the time for making such report. Such extension thereof shall be evidenced in writing, and the office shall serve a copy of the extension on both the complainant and the respondent. The panel shall then determine by majority vote whether reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15. In making such a determination, the panel shall consider only the complaint, the response, if any, and the chief officer's report; provided, however, the panel may request the chief officer to make a supplemental investigation and report with respect to any matter which it deems material to such determination.

(3) Action when violation found. If the panel, pursuant to subsection (2) determines that reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15, it may direct the chief office to endeavor to eliminate the alleged discriminatory practice through a conciliation conference. At least one panel member shall be present at any conciliation conference at which both the complainant and respondent are present or represented. If the complaint is satisfactorily resolved through conciliation, the terms of any agreement reached or undertaking given by any party shall be reduced to writing and signed by the complainant,

respondent and the chief officer. Any disagreement between the respondent and the chief office in regard to the terms or conditions of a proposed conciliation agreement may be referred to the panel which considered the complaint, and the decision of the panel with respect to such terms or conditions shall be final for purposes of conciliation proceedings under this subsection, but shall not be binding upon the respondent without his written consent thereto. No action taken or statement made in connection with any proceedings under this subsection, and no written conciliation agreement or any of the terms thereof, shall be made public by the board or any member thereof, or any agent or employee of the officer, without the written consent of the parties, nor shall any such action, statement or agreement be admissible in evidence in any subsequent proceedings; provided, however, the board or officer may institute legal proceedings under this chapter for enforcement of any written agreement or undertaking executed in accordance with this subsection."

Section 16-24.

21. If the dispute has not been satisfactorily resolved through the informal proceedings outlined in Finding 20, above, the Complaint Adjudication Committee may hold a public hearing, which is governed by the procedure set fortn in Section 16-26, which provides:

"Sec. 16-26. Hearings, findings and recommenddations [sic] when conciliation not effected.

(a) Hearing to be held; notice. If a complaint filed pursuant to this article has not been satisfactorily resolved within a reasonable time through informal proceedings pursuant to section 16-24, or if the panel investigating the complaint determines that a conciliation conference is inappropriate under the circumstances surrounding the complaint, the complaint adjudication committee may hold a public hearing thereon upon not less than ten (10) working days' written notice to the complainant or other aggrieved person, and to the respondent. If the respondent has not previously filed a written response

to the complaint, he may file such response and serve a copy thereof upon the complainant and the office not later than five (5) working days prior to the date of the hearing.

(b) Powers; rights of parties at hearing. In connection with a hearing held pursuant to subsection (1), the complaint adjudication committee shall have power upon any matter pertinent to the complaint or response thereto, to subpoena witnesses and compel their attendance; to require the production of pertinent books, papers or other documents; and to administer oaths. The complainant shall have the right to be represented by the chief officer or any attorney or any other person of his/her choice. The respondent shall have the right to be represented by any attorney or any other person of his/her choice. The complainant and respondent shall have the right to appear in person at the hearing, to be represented by an attorney or any other person, to subpoena and compel the attendance of witnesses, and to examine and cross-examine witnesses. The complaint adjudication committee may adopt appropriate rules for the issuance of subpoenas and the conduct of hearings under this section. The complaint adjudication committee and the board shall have the power to enforce discovery and subpoenas by appropriate petition to the Marion County Circuit or superior courts.

(c) Statement of evidence; exceptions; arguments. Within thirty (30) working days from the close of the hearing, the complaint adjudication committee shall prepare a report containing written recommended findings of fact and conclusions and file such report with the office. A copy of the report shall be furnished to the complainant and respondent, each of whom shall have an opportunity to submit written exceptions within such time as the rules of the complaint adjudication committee shall permit. The complaint adjudication committee may, in its discretion, upon notice to each interested party hear further evidence or argument upon the issues presented by the report and exceptions, if any.

(d) Findings of fact; sustaining or dismissing complaint. If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has engaged or is engaging in a discriminatory practice in violation of the chapter, it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent. In addition, the committee may cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice and requiring such person to take further affirmative action as will effectuate the purposes of this chapter, including but not limited to the power to restore complainant's losses incurred as a result of discriminatory treatment, as the committee may deem necessary to assure justice; to require the posting of notice setting forth the public policy of Marion County concerning equal opportunity and respondent's compliance with said policy in places of public accommodations; to require proof of compliance to be filed by respondent at periodic intervals; to require a person who has been found to be in violation of this ordinance, and who is licensed by a city or county agency authorized to grant a license, to show cause to the licensing agency why his license should not be revoked or suspended. If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has not engaged in a discriminatory practice in violation of this chapter it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent, and dismiss the complaint. Findings and conclusions made by the committee shall be based solely upon the record of the evidence presented at the hearing.

(e) Appeal to the board. Within thirty (30) working days after the issuance of findings and conclusions by the committee, either the complainant or the

respondent may file a written appeal of the decision of the committee to the board; however, in the event that the committee requires a respondent to correct or eliminate a discriminatory practice within a time period less than thirty (30) working days, then that respondent must file his/her appeal within that time period. After considering the record of the evidence presented at the hearing and the findings and conclusions of the committee, the board may affirm the decision of the committee and adopt the findings and conclusions of the committee, or it may affirm the decision of the committee and make supplemental findings and conclusions of its own, or it may reverse the decision of the committee and make findings of fact and conclusions to support its decision. The board may also adopt, modify or reverse any relief ordered by the committee. The board must take any of the above actions within thirty (30) working days after the appeal is filed.

(f) Members of board who are ineligible to participate. No member of the board who initiated a complaint under this chapter or who participated in the investigation thereof shall participate in any hearing or determination under this section as a member of either a hearing panel, the complaint adjudication committee or of the board.

(g) Appliciability [sic] of state law; judicial review. Except as otherwise specifically provided in this section or in rules adopted by the board of the complaint adjudication committee under this chapter, the applicable provisions of the Administrative Adjudication Act, IC 4-22-1, shall govern the conduct of hearings and determinations under this section, and findings of the board hereunder shall be subject to judicial review as provided in that act.

22. Relevant provisions of the Administrative Adjudication Act provide that "any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof...."

I.C. 4-22-1-14(a). Review may be obtained by filing a verified petition in the county in which the aggrieved person resides, or in any county in which the order is to be enforced, within fifteen (15) days after the agency's determination. I.C. 4-22-1-14(a) and (b).

23. If, after a finding that the respondent has engaged in a discriminatory practice, the respondent has failed to correct or eliminate the dicriminatory [sic] practice as prescribed by the board, the board may seek judicial enforcement of its decision by filing a complaint requesting temporary or permanent injunctive relief in its own name in the Marion County circuit or superior courts:

> "Sec. 16-27. Court enforcement.
>
> (a) Institution of action. In any case where the board or the committee has found that a respondent has engaged in or is engaging in a discriminatory practice in violation of sections 16-14 and/or 16-15, and such respondent has failed to correct or eliminate such discriminatory practice within the time limit prescribed by the board or the committee and the time limit for appeal to the board has elapsed, the board may file in its own name in the Marion County circuit or superior courts a complaint against the respondent for the enforcement of section 16-26. Such complaint may request such temporary or permanent injunctive relief as may be appropriate and such additional affirmative relief or orders as will effectuate the purposes of this chapter and as may be equitable, within the powers and jurisdiction of the court."

24. An aggrieved party, after filing a complaint may seek equitable relief through the courts:

> " (c) Temporary judicial relief upon filing of complaint. Upon the filing of a complaint pursuant to section 16-17 by a person claiming to be aggrieved, the chief officer, in the name of the board and in accordance with such procedures as the board shall establish by rule, may seek temporary orders for

injunctions in the Marion County circuit or superior courts to prevent irreparable harm to the complainant, pending resolution of the complaint by the office, complaint adjudication committee and the board."

Section 16-27(c).

25. Section 16-27(e) of the Ordinance provides that in complaints involving discrimination based on pornography, judicial review shall be *de novo*:

" (e) Trial de novo upon finding of sex discrimination related to pornography. In complaints involving discrimination through pornography, judicial review shall be de novo. Notwithstanding any other provision to the contrary, whenever the board or committee has found that a respondent has engaged in or is engaging in one of the discriminatory practices set forth in paragraph (g)(4) of Section 16-3 or as against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3, the board shall, within ten (10) days after making such finding, file in its own name in the Marion County circuit or superior court an action for declaratory and/or injunctive relief. The board shall have the burden of proving that the actions of the respondent were in violation of this chapter.

Provided, however, that ... in any complaint under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 no temporary or permanent injunction shall issue prior to a final judicial determination that said activities of respondent do constitute a discriminatory practice under this chapter.

Provided further, that no temporary or permanent injunction under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 shall extend beyond such material(s) that, having been described with reasonable specificity by the injunction, have been determined to be validly proscribed under the ordinance."

26. Any conclusions of law stated below, to the extent that it constitutes a finding of fact, is herein incorporated by reference as an additional finding of fact by the Court.

Conclusions of Law

1. This Court has jurisdiction of this cause pursuant to 28 U.S.C. §§1331, 1343(3), and 1343(4), 42 U.S.C. §1983, and 28 U.S.C. §§2201 and 2202, and the Court need not abstain from jurisdiction because the subject Ordinance is not susceptible to limiting constructions.

2. Because plaintiffs' contentions are rooted in the First Amendment they have standing to challenge the constitutionality of the Amendment.

3. This case is sufficiently ripe for adjudication at this time, in that there exists a case or controversy within the meaning of Article III of the United States Constitution and the case law interpreting the same.

4. The Ordinance restricts pornography, and pornography as defined in the Ordinance is speech, not conduct.

5. The First Amendment protections extend to regulation of words and pictures to the extent that they express ideas, and, therefore, constitute "speech," as that term is used in the First Amendment to the United States Constitution.

6. Only speech which does not receive First Amendment protection, may be subject to government regulation, and the controls imposed by the Ordinance do not fall within one of those established categories of speech which may be limited by legislative action, such as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words," *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed.2d 1031 (1942), or child pornography. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

7. The Ordinance's proscription of "pornography" most closely resembles proscriptions of "obscenity," which are

subject to regulation by government, but it fails to meet the legal definition of obscenity and is, therefore, a restriction on speech that has traditionally been deemed protected by the First Amendment.

8. Since the Ordinance sweeps beyond unprotected obscenity, the expressed purpose of the governmental regulation of pornography is the suppression of protected speech.

9. The proscriptions against pornography as defined in the Ordinance survive constitutional scrutiny only if the State's interest in prohibiting sex discrimination is so compelling as to outweigh the constitutionally protected interest of free speech, and the Court concludes as a matter of law that it does not outweigh the interest of free speech.

10. Assuming *arguendo* that the state's interest in prohibiting sex discrimination does outweigh the First Amendment interest of free speech, the Ordinance is nonetheless unconstitutional for the following reasons:

(a) it is unconstitutionally vague in that it fails to give fair notice to a person of average intelligence regarding what material is intended to be proscribed; and

(b) as applied to the type of activity described in Section 16-3(g)(5) and (6), it constitutes an unconstitutional prior restraint on speech because it fails to provide procedural safeguards to reduce the danger of suppressing speech otherwise protected by the First Amendment.

11. The law is with plaintiffs on all claims asserted in Count I. The Court need not reach the assertions in Counts II, III, IV, and V. However, if defendants had prevailed on Count I, the law is with plaintiffs on all claims asserted in Counts II, III, and V. As to Count IV, the law is with plaintiffs as applied to Section 16-3(g)(5) and (6) and with the defendants as applied to Section 16-3(g)(4) and (7).

12. Plaintiffs are entitled to permanent injunctive and declaratory relief, costs of litigation, and reasonable attorneys' fees.

13. Any finding of fact stated above, to the extent that it constitutes a conclusion of law, is herein incorporated by reference as an additional conclusion of law by the Court.

Dated this 19th day of November, 1984.

/s/ Sarah Evans Barker

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

MEMORANDUM

This case comes to the Court amidst heated public and private debate over the problems of pornography and sex discrimination in American society. In apparent response to the perceived urgency and seriousness of these issues, the Indianapolis City-County Council debated and enacted an ordinance with subsequent amendments which sought to deal with both of these conditions by limiting the availability in Indianapolis of materials which depict the sexually explicit subordination of women. The Council defined pornography as the graphic depiction of the sexually explicit subordination of women and then declared pornography a discriminatory practice. By way of outlawing this practice, it then forbade most of the specific acts necessary to produce, sell, or distribute such material.

It is difficult to quarrel either with the Council's underlying concern (that pornography and sex discrimination are harmful, offensive, and inimical to and inconsistent with enlightened approaches to equality) or with its premise that some legislative controls are in order. But beyond that, it is in fact outside the rightful purview of this Court to enter the public debate over whether and to what extent these conditions constitute a real social harm. It is also

beyond the purview of the Court to substitute its judgment for that of the legislative body, either in defining the acceptable community standards in these areas or in imposing appropriate sanctions for behavior which violate those standards.

Thus, the Court's duty in this circumstance is a narrow one. That duty is to assess the constitutionality of the legislative enactment: to determine whether the Ordinance, however well-motivated or otherwise meritorious it may be, unconstitutionally diminishes, violates, or otherwise derrogates [sic] our fundamental freedoms as a people.

This litigation, therefore, requires the Court to weigh and resolve the conflict between the First Amendment guarantees of free speech, on the one hand, and the Fourteenth Amendment right to be free from sex-based discrimination, on the other hand. In addition, the Court must determine whether the Indianapolis enactment meets the due process requirements of the Fifth and Fourteenth Amendments.

The plaintiffs in this lawsuit request the Court "to preliminarily and permanently enjoy enforcement of, and to declare facially unconstitutional, void and of no effect, City-County General Ordinances No. 24 and 35, 1984 (together hereinafter referred to as the "Ordinance"), on the grounds that it is unconstitutional under the United States Constitution. The Ordinance was passed by the City-[County] Council, City of Indianapolis on April 23, 1984, and amended on June 11, 1984, and was signed by the Mayor of Indianapolis on May 1, 1984, and the amendments, on June 15, 1984.

Plaintiffs have cited numerous reasons to support their claim for relief. They first contend that the Ordinance severely restricts the availability, display and distribution of constitutionally protected, non-obscene materials, in violation of the First and Fourteenth Amendments. More

specifically, they claim that the regulatory restraints of the Ordinances are not limited merely to unprotected speech, such as obscenity. As a result, plaintiffs contend that they will be forced under the Ordinance to remove from availability in Indianapolis materials which are in fact protected by the First Amendment.

Plaintiffs' [sic] also contend that in seeking to ban speech directed to the general public because it is highly offensive to many, the Ordinances violate established Supreme Court precedents which preclude the banning of speech simply because its contents may be socially or politically offensive to the majority.

The third contention of plaintiffs is that the Ordinance fails to provide fair notice to the residents of Indianapolis, and to those doing business there, as to what is covered or exempted. Because of this, the Ordinance is said to be unconstitutionally vague, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. It is also alleged that the encroachment of the Ordinance into areas of protected expression has an unconstitutionally "chilling effect" on the exercise by plaintiffs of their rights to free speech under the First Amendment.

Plaintiffs furthermore charge that the Ordinance, providing for "cease and desist" orders to enforce its proscriptions, constitutes a prior restraint which impermissibly allows a governmental Board to act as censor in determining what is and is not protected material under the First Amendment, and to control what materials may be written, distributed, sold, viewed or read in Indianapolis.

Finally, plaintiffs contend that the Ordinance interferes with the free flow of constitutionally protected books, periodicals, motion pictures, and television programs across state lines, in violation of the Commerce Clause of the United States Constitution, Article I, Section 8, and the laws thereunder which Congress has promulgated.

The defendants admit in their answer that the scope of the Ordinance goes beyond regulating obscene materials. However, they assert, such action does not violate the Constitution. Defendants deny every other allegation that the plaintiffs' rights as guaranteed by the United States Constitution are violated by this Ordinance.

I.

JURISDICTION: STANDING AND RIPENESS

Before turning to a discussion of the constitutionality of the Ordinance, it is first necessary to decide whether the plaintiffs have standing to sue, and, if so, whether the case itself is ripe for adjudication.

As mentioned above, the plaintiffs complain that the Ordinance fails to define adequately the type of material intended to be regulated, that it permits unconstitutional prior restraints on speech, and that it is vague and overbroad, all in violation of the First Amendment.

Because the plaintiffs' "claims are rooted in the First Amendment, they are entitled to rely on the impact of the [Ordinance] on the expressive activities of others as well as their own." *Shad v. Bourough of Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). When there are claims based on vagueness and overbreadth, case law "firmly establishes" that plaintiffs do in fact have standing to challenge the legislation. *See Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972); *See also, Shad, supra*, 452 U.S. at 66, 101 S.Ct. at 2181; *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). In addition, the complaint makes it clear that plaintiffs' interests are directly affected by the challenged Ordinance, and the Court does here so find. Based on these principles and findings the Court determines that the plaintiffs have standing to challenge the constitutionality of the Ordinance, both in their own individual capacities, and on behalf of others not presently before the Court but who may be similarly situated.

Besides challenging standing, the defendants also contest the propriety of adjudicating these issues at this time, claiming no substantial controversy exists between the parties. Defendants correctly point out that "[t]he basic inquiry is whether the 'conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979) (quoting *Railway v. Mail Association* [sic] *v. Corsi*, 326 U.S. 88, 93 (1945)) (other citations omitted). However, to establish a "case or controversy" under Article III of the Constitution, plaintiffs need not necessarily be the subjects of an administrative or judicial proceeding at the time the lawsuit is initiated. *Babbit, supra*, 442 U.S. 297-99, 99 S.Ct. at 2308-09; *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980), *cert. denied* 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). *See also, Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

Accordingly, the Court finds that this action presents a justiciable case or controversy. Plaintiffs have alleged that the material they sell, distribute, and exhibit falls within the Ordinance, as best they can determine. The fact that the City-County Council amended the initially-passed Ordinance during the pendency of this lawsuit, also "indicates more than a broad policy that it will enforce this law generally." *Maciejewski, supra*, 631 F.2d at 500. Defendants, in fact, have given no indication that they will not enforce the Ordinance if this Court's stay is lifted and the new law is allowed to go into effect. "Under such circumstances, this Court does not feel it 'necessary that [plaintiffs] first expose [themselves] to actual ... prosecution to be entitled to challenge a statute [which they claim] deters the exercise of [their] constitutional rights.'"

NATCO Theatres v. Ratner, 463 F.Supp. 1124, 1127 (S.D.N.Y. 1979), quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974). *See also Craig v. Boren*, 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976).

II.

FIRST AMENDMENT REQUIREMENTS

This Ordinance cannot be analyzed adequately without first recognizing this: the drafters of the Ordinance have used what appears to be a legal term of art, "pornography," but have in fact given the term a specialized meaning which differs from the meanings ordinarily assigned to that word in both legal and common parlance. In Section 16-3(v) (page 6), the Ordinance states:

> "Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes one or more of the following: . . ."

There follows at that point a listing of five specific presentations of women in various settings which serve as examples of "pornography" and as such further define and describe that term under the Ordinance.

As is generally recognized, the word "pornography" is usually associated, and sometimes synonomous, with the word, "obscenity." "Obscenity" not only has its own separate and specialized meaning in the law, but in laymen's use also, and it is a much broader meaning than the definition given the word "pornography" in the Ordinance which is at issue in this action. There is thus a considerable risk of confusion in analyzing this ordinance unless care and precision are used in that process.

The Constitutional analysis of this Ordinance requires a determination of several underlying issues: first, the Court must determine whether the Ordinance imposes restraints on speech or behavior (content versus conduct); if the

Ordinance is found to regulate speech, the Court must next determine whether the subject speech is protected or not protected under the First Amendment; if the speech which is regulated by this Ordinance is protected speech under the Constitution, the Court must then decide whether the regulation is constitutionally permissible as being based on a compelling state interest justifying the removal of such speech from First Amendment protections.

A. **Do the Ordinances regulate speech or behavior (content or conduct)?**

It appears to be central to the defense of the Ordinance by defendants that the Court accept their premise that the City-County Council has not attempted to regulate speech, let alone protected speech. Defendants repeat throughout their briefs the incantation that their Ordinance regulates conduct, not speech. They contend (one senses with a certain sleight of hand) that the production, dissemination, and use of sexually explicit words and pictures *is* the actual subordination of women and not an expression of ideas deserving of First Amendment protection. (Defendants' Memorandum In Opposition to Plaintiffs' Motion For Summary Judgment, pp. 17-21).

Defendants claim support for their theory by analogy, arguing that it is an accepted and established legal distinction that has allowed other courts to find that advocacy of a racially "separate but equal" doctrine in a civil rights context is protected speech under the First Amendment though "segregation" is not constitutionally protected behavior. Accordingly, defendants characterize their Ordinance here as a civil rights measure, through which they seek to prevent the distribution, sale, and exhibition of "pornography," as defined in the Ordinance, in order to regulate and control the underlying unacceptable conduct.

The content-versus-conduct approach espoused by defendants is not persuasive, however, and is contrary to

tion, the Supreme Court has recently upheld legislation prohibiting the dissemination of material depicting children engaged in sexual conduct. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

Having found that the Ordinance at issue here seeks to regulate speech (and not conduct), the next question before the Court is whether the Ordinance, which seeks to restrict the distribution, sale, and exhibition of "pornography" as a form of sex discrimination against women, falls within one of the established categories of speech subject to permissible government regulation, that is, speech deemed to be unprotected by the First Amendment.

It is clear that this case does not present issues relating to profanity, libel, or "fighting words."[1] In searching for an analytical "peg," the plaintiffs argue that the Ordinance most closely resembles obscenity, and is, therefore, subject to the requirements set forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). (Plaintiffs' Memorandum Of Law In Support Of Moving Plaintiffs' Motion Pursuant to Federal Rules of Civil Procedure 56 for Summary Judgment, pp. 18-23). But the defendants admit that the scope of the Ordinance is not limited to the regulation of legally obscene material as defined in *Miller*. (*See*, Answer of Defendants William H. Hudnut, III, et al., ¶ 9). In fact, defendants concede that the "pornography" they

[1] Defendants attempt to utilize the language "[words] by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. at 769, as legal justification for upholding the Ordinance as unprotected speech. Their argument is that pornography "is nothing more than the infliction of injury on women," and is, therefore, unprotected under the First Amendment. (Defendants' Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment, p.22.) In coming to this view, however, defendants have read this passage out of context. The quoted portion of *Chaplinsky* is in reference to the category of speech known as "fighting words," which by their very nature carry the immediate potential for injury. But "pornography" does not fall within the meaning of "fighting words," as that concept has come to be used. The rationale of *Chaplinsky* is, therefore, distinguishable from the instant case and thus not applicable here.

seek to control goes beyond obscenity, as defined by the Supreme Court and excepted from First Amendment protections. Accordingly, the parties agree that the materials encompassed in the restrictions set out in the Ordinance include to some extent what have traditionally been protected materials.

The test under *Miller* for determining whether material is legal obscenity is:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the purient [sic] interest, ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (citations omitted)

413 U.S. at 24, 93 S.Ct. at 2615.

It is obvious that this three-step test is not directly applicable [to] the present case, because, as has been noted, the Ordinance goes beyond legally obscene material in imposing its controls. The restrictions in the Indianapolis ordinance reach what has otherwise traditionally been regarded as protected speech under the *Miller* test. Beyond that, the Ordinance does not speak in terms of a "community standard" or attempt to restrict the dissemination of material that appeals to the "prurient interest." Nor has the Ordinance been drafted in a way to limit only distributions of "patently offensive" materials. Neither does it provide for the dissemination of works which, though "pornographic," may have "serious literary, artistic, political or scientific value." Finally, the Ordinance does not limit its reach to "hard core sexual conduct," though conceivably "hard core" materials may be included in its proscriptions.

Because the Ordinance spans so much more broadly in its regulatory scope than merely "hard core" obscenity by

limiting the distribution of "pornography," the proscriptions in the Ordinance intrude with defendants' explicit approval into areas of otherwise protected speech. Under ordinary constitutional analysis, that would be sufficient grounds to overturn the Ordinance, but defendants argue that this case is not governed by any direct precedent, that it raises a new issue for the Court and even though the Ordinance regulates protected speech, it does so in a constitutionally permissible fashion.

C. **Does established First Amendment law permit the regulation provided for in the Ordinance of otherwise protected speech?**

In conceding that the scope of this Ordinance extends beyond constitutional limits, it becomes clear that what defendants actually seek by enacting this legislation is a newly-defined class of constitutionally unprotected speech, labeled "pornography" and characterized as sexually discriminatory.

Defendants vigorously argue that *Miller* is not the "'constitutional divide' separating protected from unprotected expression in this area." (Defendants' Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment, pp. 27-31). Defendants point to three cases which allegedly support their proposition that *Miller* is not the exclusive guideline for disposing of pornography/obscenity cases, and that the traditional obscenity test should not be applied in the present case. *See New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

Defendants first argue that the Court must use the same reasoning applied by the Supreme Court in *New York v. Ferber, supra*, which upheld a New York statute prohibit-

ing persons from promoting child pornography by distributing material which depicted such activity, and carve out another similar exception to protected speech under the First Amendment.

Defendants can properly claim some support for their position in *Ferber*. There the Supreme Court allowed the states "greater leeway" in their regulation of pornographic depictions of children in light of the State's compelling interest in protecting children who, without such protections, are extraordinarily vulnerable to exploitation and harm. The Court stated in upholding the New York statute:

> "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern: ...."

102 S.Ct. at 3355. The Supreme Court continued in *Ferber* by noting that the *Miller* standard for legal obscenity does not satisfy the unique concerns and issues posed by child pornography where children are involved; it is irrelevant, for instance, that the materials sought to be regulated contain serious literary, artistic, political or scientific value. In finding that some speech, such as that represented in depictions of child pornography, is outside First Amendment protections, the *Ferber* court stated:

> "When a definable class of material, such as that covered by §263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."

Id. at 3358.

Defendants, in the case at bar, argue that the interests of protecting women from sex-based discrimination are

analogous to and every bit as compelling and fundamental as those which the Supreme Court upheld in *Ferber* for the benefit of children. But *Ferber* appears clearly distinguishable from the instant case on both the facts and law.

As has already been shown, the rationale applied by the Supreme Court in *Ferber* appears intended to apply solely to child pornography cases. In *Ferber*, the court recognized "that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' *Globe Newspapers v. Superior Court*, ___ U.S. ___, ___, 102 S.Ct. 2613, 2621, 72 L.Ed.2d (1982)." 102 S.Ct. at 3354. *See also, FCC v. Pacifica Foundation, supra; Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944); *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). Also, the obscenity standard in *Miller* is appropriately abandoned in child pornography cases because it "[does] not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitations of children." *Id.* Since a state's compelling interest in preventing child pornography outweighs an individual's First Amendment rights, the Supreme Court held that "the states are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* at 3354.

On contrast, the case at bar presents issues more far reaching than those in *Ferber*. Here, the City-County Council found that the distribution, sale, and exhibition of words and pictures depicting the subordination of women is a form of sex discrimination and as such is appropriate for governmental regulation. The state has a well-recognized interest in preventing sex discrimination, and, defendants argue, it can regulate speech to accomplish that end.

But the First Amendment gives primacy to free speech and any other state interest (such as the interest of sex based equality under law) must be so compelling as to be

fundamental; only then can it be deemed to outweigh the interest of free speech. This Court finds no legal authority or public policy argument which justifies so broad an incursion into First Amendment freedoms as to allow that which defendants attempt to advance here. *Ferber* does not open the door to allow the regulation contained in the Ordinance for the reason that adult women as a group do not, as a matter of public policy or applicable law, stand in need of the same type of protection which has long been afforded children. This is true even of women who are subject to the sort of inhuman treatment defendants have described and documented to the Court in support of this Ordinance. The Supreme Court's finding in *Ferber* of the uncontroverted state interest in "safeguarding the physical and psychological well being of a minor" and its resultant characterization of that interest as "compelling," 102 S.Ct. 3348, 3354, is an interest which inheres to children and is not an interest which is readily transferrable to adult women as a class. Adult women generally have the capacity to protect themselves from participating in and being personally victimized by pornography, which makes the State's interest in safeguarding the physical and psychological well-being of women by prohibiting "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words" not so compelling as to sacrifice the guarantees of the First Amendment. In any case, whether a state interest is so compelling as to be a fundamental interest sufficient to warrant an exception from constitutional protections, therefore, surely must turn on something other than mere legislative dictate, which issue is discussed more fully further on in this Opinion. *See* Section "C," *Infra.*

The second case relied upon by defendants to support their contention that *Miller* is not controlling in the present case is *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). According to defendants, *Pacifica* exemplifies the Supreme Court's refusal to make

obscenity the sole legal basis for regulating sexually explicit conduct.

In *Pacifica*, the Supreme Court was faced with the question of whether a broadcast of patently offensive words dealing with sex and excretion may be regulated on the basis of their content. 438 U.S. at 745, 98 S.Ct. at 3038. The Court held that this type of speech was not entitled to absolute constitutional protection in every context. *Id.* at 747, 98 S.Ct. at 3039. Since the context of the speech in *Pacifica* was broadcasting, it was determined only to be due "the most limited First Amendment protection." *Id.* at 748, 98 S.Ct. 3040. The reason for such treatment was twofold:

> "First, the broadcast media have established a uniquely pervasive presence in all the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."
>
> * * *
>
> Second, broadcasting is uniquely accessible to children, even those too young to read..."

Id. at 748-49, 98 S.Ct. at 3040.

Although the defendants correctly point out that the Supreme Court did not use the traditional obscenity test in *Pacifica*, this Court is not persuaded that the rule enunciated there is applicable to the facts of the present case. The Ordinance does not attempt to regulate the airwaves; in terms of its restrictions, it is not even remotely concerned with the broadcast media. The reasons for the rule in *Pacifica*, that speech in certain contexts should be afforded minimal First Amendment protection, are not present here, since we are not dealing with a medium that "invades" the privacy of the home. In contrast, if an individual is offended by "pornography," as defined in the

Ordinance, the logical thing to do is avoid it, an option frequently not available to the public with material disseminated through broadcasting.

In addition, the Ordinance is not written to protect children from the distribution of pornography, in contrast to the challenged FCC regulation in *Pacifica*. Therefore, the peculiar state interest in protecting the "well being of its youth," *id.* at 649, 98 S.Ct. at 3040 (quoting *Ginsberg v. New York*, 390 U.S. 629, 33 S.Ct. 1274, 20 L.Ed.2d 195 (1968)), does not underlie this Ordinance and cannot be called upon to justify a decision by this Court to uphold the Ordinance.

The third case cited by defendants in support of their proposition that the traditional obscenity standard in *Miller* should not be used to overrule the Ordinance is *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). In *Young* the Supreme Court upheld a city ordinance that restricted the location of movie theatres featuring erotic films. The Court, in a plurality opinion, stated that "[e]ven though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." 427 U.S. at 71-72, 96 S.Ct. at 2452. The Court concluded that the city's interest in preserving the character of its neighborhoods justified the ordinance which required that adult theaters be separated, rather than concentrated, in the same areas as it is permissible for other theaters to do without limitation. *Id.* at 71, 96 S.Ct. at 2452-53.

Young is distinguishable from the present case because we are not here dealing with an attempt by the City-County Council to restrict the time, place, and manner in which "pornography" may be distributed. Instead, the Ordinance prohibits completely the sale, distribution, or exhibition of material depicting women in a sexually subordinate role, at all times, in all places and in every manner.

The Ordinance's attempt to regulate speech beyond one of the well-defined exceptions to protected speech under the first Amendment is not supported by other Supreme Court precedents. The Court must, therefore, examine the underlying premise of the Ordinance: that the State has so compelling an interest in regulating the sort of sex discrimination imposed and perpetuated through "pronography" that it warrants an exception to free speech.

C. Is sex discrimination a compelling state interest justifying an exception to First Amendment Protections?

It is significant to note that the premise of the Ordinance is the sociological harm, *i.e.*, the discrimination, which results from "pornography" to degrade women as a class. The Ordinance does not presume or require specifically defined, identifiable victims for most of its proscriptions. The Ordinance seeks to protect adult women, as a group, from the diminution of their legal and sociological status as women, that is, from the discriminatory stigma which befalls women *as women* as a result of "pornography." On page one of the introduction to defendants' *Amicus* Brief, counsel explicitly argues that the harm which underlies this legislation is the "harm to the treatment and *status* of women ... on the basis of sex." *See* Brief of Linda Marchiano *Amicus Curiae*, page 1 (emphasis supplied).

This is a novel theory advanced by the defendants, an issue of first impression in the courts. If this Court were to accept defendants' argument — that the State's interest in protecting women from the humiliation and degradation which comes from being depicted in a sexually subordinate context is so compelling as to warrant the regulation of otherwise free speech to accomplish that end — one wonders what would prevent the City-County Council (or any other legislative body) from enacting protections for other equally compelling claims against exploitation and discrimination as are presented here. Legislative bodies,

finding support here, could also enact legislation prohibiting other unfair expression — the publication and distribution of racist material, for instance, on the grounds that it causes racial discrimination,[2] or legislation prohibiting ethnic or religious slurs on the grounds that they cause discrimination against particular ethnic or religious groups, or legislation barring literary depictions which are uncomplimentary or oppressive to handicapped persons on the grounds that they cause discrimination against that group of people, and so on. If this Court were to extend to this case the rationale in *Ferber* to uphold the Amendment, it would signal so great a potential encroachment upon First Amendment freedoms that the precious liberties reposed within those guarantees would not survive. The compelling state interest, which defendants claim gives constitutional life to their Ordinance, though important and valid as that interest may be in other contexts, is not so fundamental an interest as to warrant a broad intrusion into otherwise free expression.

Defendants contend that pornography is not deserving of constitutional protection because its harms victimize all women. It is argued that "pornography" not only negatively effects [sic] women who risk and suffer the direct abuse of

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[2] In *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952), the Supreme Court upheld an Illinois libel statute prohibiting the dissemination of materials promoting racial or religious hatred and which tended to produce a breach of the peace and riots. It has been recognized that "the rationale of that decision turns quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder." *Collins v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978). The Supreme Court has recognized breach of the peace as the traditional justification for upholding a criminal libel statute. *Beauharnais*, 343 U.S. at 254, 72 S.Ct. at 729. Therefore, a law preventing the distribution of material that causes racial discrimination, an attitude, would be upheld under this analysis. Further, the underlying reasoning of the *Beauharnais* opinion, that the punishment of libel raises no constitutional problems, has been questioned in many recent cases. *See Collins, supra*, 578 F.2d at 1205, and cases cited therein.

its production,[3] but also, those on whom violent pornography is forced through such acts as compelled performances of "dangerous acts such as being hoisted upside down by ropes, bound by ropes and chains, hung from trees and scaffolds or having sex with animals. . . ." Defendants' Memorandum In Support To Plaintiffs' Motion For Summary Judgment, pp.3-4.[4] It is also alleged that exposure to pornography produces a negative impact on its viewers, causing in them an increased willingness to aggress toward women, *ibid.* at p.4, and experience self-generated rape fantasies, increases in sexual arousal and a rise in the self-reported possibility of raping. *Ibid.* at p.6. In addition, it causes discriminatory attitudes and behavior toward all women. *Ibid*, at pp.11-12. The City-County Council, after considering testimony and social research studies, enacted the Ordinance in order to "combat" pornography's "concrete and tangible harms to women." *Ibid.* at p.13.

Defendants rely on *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 98 S.Ct. 2628, 37 L.Ed.2d 446 (1965), to justify their regulation of "pornography." In that case the Supreme Court held "that there are legitimate state interests at stake in stemming the tide of commercialized obscenity ... [which] include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." 413 U.S. at 57-58, 93 S.Ct. 2635.

The Georgia Legislature had determined that in that case exposure to obscene material adversely affected men

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[3] The defendants point to social research data, as well as graphic personal accounts of individuals, in support of their position that "women are recruited into all forms of sexual exploitation through physical force, psychological coercion, drugs and economic exigencies." Defendants' Memorandum In Support To Plaintiffs' Motion For Summary Judgment, p.2.

[4] Examples of these types of "harms" were submitted to the City-Council at the public hearings held in regard to the Amendment. *See* Exhibits A-U.

and women, that is to say, society as a whole. Although the petitioners argued in that case that there was no scientific data to conclusively prove that proposition, the Court said, "[i]t is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the constitution itself." *Id.* at 60, 93 S.Ct. at 2636-37 (footnote omitted).

In *Slaton*, the Georgia Legislature sought to regulate "obscenity," an accepted area of unprotected speech. *See Miller v. Cohen* [sic], 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Court specifically found that "nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California*..." 413 U.S. at 69, 93 S.Ct. at 2642 (citations omitted).

Based on this reasoning, defendants argue that there is more than enough "empirical" evidence in the case at bar to support the City-County Council's conclusion that "pornography" harms women in the same way obscenity harms people, and, therefore, this Court should not question the legislative finding. As has already been acknowledged, it is not the Court's function to question the City-County Council's legislative finding. The Court's solitary duty is to ensure that the Ordinance accomplishes its purpose without violating constitutional standards or impinging upon constitutionally protected rights. In applying those tests, the Court finds that the Ordinance cannot withstand constitutional scrutiny.

It has already been noted that the Ordinance does not purport to regulate legal obscenity, as defined in *Miller*. Thus, although the City-County Council determined that "pornography" harms women, this Court must and does

declare the Ordinance invalid without being bound by the legislative findings because "pornography," as defined and regulated in the Ordinance, is constitutionally protected speech under the First Amendment and such an exception to the First Amendment protections is constitutionally unwarranted.[5] This Court cannot legitimately embark on judicial policy-making, carving out a new exception to the First Amendment simply to uphold the Ordinance, even when there may be many good reasons to support legislative action. To permit every interest group, especially those who claim to be victimized by unfair expression, their own legislative exceptions to the First Amendment so long as they succeed in obtaining a majority of legislative votes in their favor demonstrates the potentially predatory nature of what defendants seek through this Ordinance and defend in this lawsuit.

It ought to be remembered by defendants and all others who would support such a legislative initiative that, in terms of altering sociological patterns, much as alternation may be necessary and desirable, free speech, rather than being the enemy, is a long-tested and worthy ally. To deny free speech in order to engineer social change in the name of accomplishing a greater good for one sector of our society erodes the freedoms of all and, as such, threatens tyranny and injustice for those subjected to the rule of such laws. The First Amendment protections presuppose the evil of such tyranny and prevent a finding by this Court upholding the Ordinance.

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[5] Defendants again rely on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), contending that since the legislation in that case was upheld upon a single affidavit of a sociologist that the location of adult movie theatres had a disruptive impact on the community, the Ordinance should be upheld because there is more than enough data to demonstrate that pornography harms women. As discussed above in subpart B, however, the legislation in *Young* sought to regulate the place where pornography could be distributed, not to completely ban its distribution. Thus *Young* is not controlling.

III.

FIFTH AMENDMENT DUE PROCESS REQUIREMETS

Assuming *arguendo* that the Court had found that the State has a compelling interest in preventing sex discrimination which interest outweighs First Amendment rights, there remain other constitutional requirements which the Ordinance must satisfy in order to be upheld. The Court must determine if the Ordinance is unconstitutionally vague, if it is facially overbroad, if it constitutes a prior restraint on free speech, or if it violates procedural due process safeguards. The Court, therefore, shall here address each of these issues as if it had found the Ordinance to be properly-regulated speech.

A. Vagueness

Plaintiffs contend the Ordinance is unconstitutionally vague, in that it fails to give fair notice of the material intended to be regulated. Plaintiffs challenge a long list of words and phrases on the grounds they are unconstitutionally vague:

"pornography"
"graphic sexually explicit subordination"
"subordination of women"
"sexual objects for domination, conquest, violation, exploitation, possession or use"
"postures or positions of servility, submission, or display"
"special display presentations of pornography"
"a woman acting against the subordination of women"
"in the way women are injured by it"
"forcing pornography on a person"
"directly caused by specific pornography"
"the use of men, children or transsexuals in the place of women,"
"unlawful"
"isolated passages or isolated parts"

Plaintiffs also contest on the grounds of vagueness Section 16-28 relating to exhaustion of remedies.

In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the Supreme Court stated that a law is void for vagueness if its prohibitions are not clearly defined.

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked.'"

408 U.S. at 108-09, 92 S.Ct. at 2298-99 (footnotes omitted).

The Supreme Court in *Keyishian v. Board of Regents*, 385 U.S. 589, 603-4 (1967) has cautioned that:

> "precision of regulation must be the touchstone in an area so colsely touching our most precious freedoms. ... Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity ... when one must guess what conduct or utterance may (lead to governmental action taken against him), one necessarily will 'steer far wider of the unlawful zone.'"

In examining the subject enactments, the Court is struck by the vagueness problems inherent in the definition of pornography, itself, more specifically, the term, "subordination of women." That term is not specifically defined in the Ordinance, and it is almost impossible to settle in ones [sic] own mind or experience upon a single meaning or understanding of that term. At the very least, it is difficult to settle upon a meaning which will give persons "of ordinary intelligence a reasonable opportunity to know what is prohibited, so that (they) may act accordingly." *Grayned, supra*, 408 U.S. at 108. Nothing in the Ordinance, for instance, suggests whether the forbidden "subordination of women" relates to a physical, social, psychological, religious, or emotional subordination or some other form or combination of these. What constitutes subordination under this Ordinance is left finally to the censorship committee or to individual plaintiffs who choose to bring actions to enforce provisions (of the Ordinance), and under any due process standards, that is unfair in a fundamental and constitutional sense.

The enumerated categories of pornography set out in the Ordinance are also plagued with these same constitutional deficiencies relating to vagueness. For instance, the Ordinance makes it unlawful to depict women, whether in "words or pictures," in "scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual." (Section 16-3(q)(5)). The meanings of the terms, "degradation," "abasement," and "inferior," are subjective terms, reflective of the observer's state of mind. Because these terms arguably have several different meanings, a person of "ordinary intelligence" would not be on notice as to what acts are proscribed by the Ordinance. This vagueness problem is compounded when these terms are joined, definitionally, with the phrase, "in a context that makes these conditions sexual," which is, in itself, also subject to several meanings and which phrase is not further

defined in the Ordinance. How then are buyers or sellers of literature, *e.g.*, *The Witches of Eastwick*, by John Upkide [sic], to know if their interpretation of the prohibitions in the Ordinance comports with that of the censorship committee or the individuals who seek to privately enforce the Ordinance? The Ordinance clearly threatens to "trap the innocent by not providing fair warning," which makes its provisions impermissibly vague in violation of the Due Process Clause of the Fifth Amendment. *See Grayned*, *supra*, 408 U.S. at 108-09, 92 S.Ct. at 2298-99.

This is the vagueness which the Fifth Amendment/Due Process rules protect against. Many, if not all of the other words and phrases challenged by plaintiff in this lawsuit on the grounds of vagueness are as difficult, indeed, mystifying as to their precisely-intended meanings, as is "the subordination of women." It is beyond the proper exercise of judicial authority to attempt to re-write the Ordinance to overcome such problems as vagueness, *see Miller v. California*, 413 U.S. at 26, 93 S.Ct. at 2615, and the Court thereby refrains from offering definitions or new language to satisfy constitutional standards. But the Court finds the Ordinance unconstitutionally vague in its use of particular phrases as well as its more generalized prohibitions. Persons subjected to this Ordinance cannot reasonably steer between lawful and unlawful conduct, with confidence that they know what its terms prohibit.

B. Overbreadth

Plaintiffs also contend that the Ordinance is unconstitutionally overbroad because it restricts the sale, distribution, and exhibition of material protected by the First Amendment. Specifically, plaintiffs allege that the Ordinance regulates non-obscene material and is not limited to the proscription of "hard core" pornography. *See Miller v. California*, *supra*. Plaintiffs claim that "pornography," as defined in the Ordinance, "contains no 'community standard' test, does not require that the

material be 'patently offensive' or 'taken as a whole,' and fails to exempt works that have serious 'literary, artistic, political or scientific value.'" *See* Memorandum Of Law In Support Of Moving Plaintiffs' Motion Pursuant to Fed.R.Civ.P. 56 For Summary Judgment, p.19.[6]

Because the Court has already determined that the Ordinance on its face violates the First Amendment, it need not belabor its discussion as to overbreadth. The Court specifically found that the Ordinance proscribes protected First Amendment speech. In order to discuss the overbreadth in this context, the Court would have to assume as argument that the Ordinance actually proscribes unprotected speech. Obviously, if it proscribes unprotected speech, it raises no constitutional issues, in particular, issues relating to overbreadth. There being no purpose served by such a discussion and the other related constitutional issues having been otherwise resolved, the Court makes no finding as to overbeadth.

C. Prior Restraint

Plaintiffs contend that the Ordinance is an unconstitutional prior restraint on free speech, in that it allows the City-County government acting through an operating board to prevent the circulation of a book, magazine or movie because some of the citizens disagree with its contents.

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[6] Examples of non-obscene films that plaintiffs claim will fall within the meaning of "pornography" are: "Dressed to Kill," "Ten," "Star 80," "Body Heat," "Swept Away," and "Last Tango In Paris." Plaintiffs also contend that the following books would come within the Amendment: *The Witches of Eastwick*, by John Updike, *The Delta of Venus*, Anais Nin, *The Other Side of Midnight*, by Sidney Shelton, *Scruples*, by Judith Krantz, various James Bond novels by Ian Flemming, *The Carpetbaggers*, by Harold Robbins. Amici American Civil Liberties Union and the Indiana Civil Liberties Union have attached a "sampling" of art, literature, and scholarly material they say will be proscribed under the Amendment. *See* Brief of the Amer.Civ.Lib.Union and the Ind.Civ.Lib.Union Amici Curiae, overbreadth appendix.

The Court finds that one portion of the Ordinance contains a censorship system which does comport with constitutional requirements and that it is, therefore, a lawful prior restraint, but that a second part does not satisfy constitutional requirements and is thus violative of the Constitution. Different administrative procedures apply to the four different types of discriminatory practices enunciated in Section 16-3(g)(4)-(7) of the Ordinance. The procedure specifically applicable to trafficking in pornography, Section 16-3(g)(4), and assault or physical attack due to pornography, Section 16-3(g)(7), satisfies the applicable constitutional requirements and is, therefore, lawful, while the provisions relating to coercion into pornography, Section 16-3(g)(5), and forcing pornography on a person, Section 16-3(g)(6), do not meet the requisite constitutional standards.

A prior restraint is not unlawful *per se*. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, n.10, 83 S.Ct. 631, 639 n.10 (1963). However, any system of prior restraints bears a heavy presumption against its constitutional validity. *Id.* To be upheld as a lawful prior restraint, defendants must make two showings: (1) that the Ordinance falls within one of the narrowly defined exceptions to the prohibition against prior restraint and (2) that the Ordinance complies with the procedural safeguards that reduce the danger of suppressing speech protected under the First Amendment. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1247; *Bantam Books, supra*, 372 U.S. at 71, 83 S.Ct. at 639.

Obscenity has traditionally been one of the narrowly-defined exceptions to the rule against prior restraints emanating from the First Amendment, *see Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965), and, since the *Ferber* opinion in 1982, child pornography has also been excepted. Even if we assume that the Ordinance imposes a "permissible" prior restraint as discussed above, it must independently afford procedural due process protections. *Conrad, supra.*

In *Freedman v. Maryland, supra*, the Supreme Court set forth the procedural requirements necessary to insure against the suppression of protected speech. The Court stated that a system of prior restraint

> "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden the proving that the film is unprotected expression must rest on the censor. . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [Third,] the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

380 U.S. at 58-59, 85 S.Ct. at 739. *See Conrad*, 420 U.S. at 560, 95 S.Ct. at 1247.

As mentioned above, the Ordinance provisions relating to coercion and forcing pornography as contained in Section 16-26(d) do not meet the procedural requirements of *Freedman*; thus, such provisions constitute an unlawful prior restraint. The provisions in question allow the governmental committee to make findings and conclusions based upon the evidence presented, and to either sustain or dismiss the complaint. The provisions also give the Board the authority to issue an order requiring respondent to cease and desist from doing the unlawful discriminatory practice as defined in the Ordinance, as well as the authority to restore to the complainant any losses incurred as a result of the discriminatory practice. Finally, the provisions broadly permit the Board to take any other affirmative action necessary to effectuate the purposes of the Ordinance.

The Committee's findings and conclusions may be appealed; however, the burden of taking the appeal is upon the party against whom the decision has been made. Section 16-26(e). After the decision of the Board is made, whether it is an affirmation or reversal of the Committee's decision, it may be appealed to the state courts by an aggrieved party in accordance with the provisions of the Administrative Adjudication Act. Section 16-26(g). The Act further provides that the burden is upon the aggrieved party to file a verified petition within fifteen (15) days after the Board's determination. I.C. 4-22-1-14(a) and (b).

This procedural scheme is unconstitutional for several reasons. First, if the Board decides in favor of the complainant, it is the responsibility of the respondent, as an aggrieved party, to initiate judicial proceedings to prove that the material is protected. Second, the prior restraint, once imposed, lasts until the pendency of judicial review by the court. Also, the Board, in its discretion, may award to the complainant an amount to compensate for any losses, or any other relief it deems necessary. This process goes far beyond the mere preservation of the status quo. Third, there are no provisions allowing for a "prompt" judicial determination of the Board's decision. *See* I.C. 4-22-1-18 (1984). This type of procedure is expressly prohibited by *Freedman*, and it constitutes an unlawful prior restraint.

Although the provisions just out-lined fail to satisfy the procedural requirements, there are other provisions in the Ordinance which relate specifically to trafficking in pornography and assault or physical attack due to pornography which do meet the *Freedman* test. The first requirement is met in Section 16-27(e), which provides that the burden of instituting judicial proceedings is upon the censor:

> "whenever the board or committee has found that a respondent has engaged in or is engaging in one of the discriminatory practices set forth in paragraph (g)(4) of Section 16-3, or as against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3, the

> board shall, within ten (10) days after making such finding, file in its own name in the Marion County circuit or superior court an action for declaratory and/or injunctive relief. The board shall have the burden of proving that the actions of the respondent were in violation of this chapter."

Section 16-27(e). The second and third requirements of *Freedman*, that any restraint prior to judicial review be imposed only for a brief period of time to preserve the status quo and that final judicial review be prompt, have also been satisfied:

> "that in any complaint under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 no temporary or permanent injunction shall issue prior to a final judicial determination that said activities of respondent do constitute a discriminatory practice under this chapter."

Section 16-27(e). This system of prior restraints is constitutional insofar as the procedural mandates of *Freedman* are concerned. However, even though certain portions of the administrative process outlined by the Ordinance pass constitutional muster, because the *Freeman* [sic] procedural due process standard is not satisfied *in toto*, the entire Ordinance fails for imposing an unconstitutional prior restraint on First Amendment expression.

SUMMARY

For the foregoing reasons, the Court finds that the Ordinance regulates speech protected by the First Amendment and is, therefore, in violation of the United States Constitution. The Ordinance's proscriptions are not limited to categories of speech, such as obscenity or child pornography, which have been excepted from First Amendment protections and permitted some governmental regulation. The City-County Council, in defining and outlawing "pornography" as the graphically depicted

subordination of women, which it then characterizes as sex discrimination, has sought to regulate expression, that is, to suppress speech. And although the State has a recognized interest in prohibiting sex discrimination, that interest does not outweigh the constitutionally protected interest of free speech. For these reasons the Ordinance does not withstand this constitutional challenge.

Dated this 19th day of November, 1984.

/s/ Sarah Evans Barker

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1985.

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al., *Plaintiffs-Appellees,*	) Appeal from the) United States) District Court for) the Southern
No. 84-3147 vs.	) District of Indiana,) Indianapolis
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al., Defendants-Appellants.	) Division.) No. 84 C 791) Sarah Evans Barker, *Judge*

ORDER

Defendants-appellants filed a petition for rehearing and suggestion of rehearing en banc on September 10, 1985. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

U.S.C.A. — 7th Circuit
RECEIVED
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THOMAS F. STRUBBE
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APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,	)	
Plaintiffs-Appellees,	)	
vs.	)	NO. 84-3147
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al.,	)	
Defendants-Appellants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William H. Hudnut, III, Mayor of the City of Indianapolis, et al., the Defendants-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Seventh Circuit entered in this action on August 27, 1985 in which Section 16-3(q) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana was struck down as violative of the First Amendment to the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

CITY-COUNTY LEGAL DIVISION
JOHN P. RYAN
CORPORATION COUNSEL

By: /s/ Mark Dall
Mark Dall
Assistant Corporation Counsel

By: /s/ Kathryn A. Watson
Kathryn A. Watson
Assistant Corporation Counsel

APPENDIX E

CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA

Chapter 16

HUMAN RELATIONS; EQUAL OPPORTUNITY*

Sec. 16-1. Findings, policies and purposes.

(a) *Findings.* The city-county council hereby makes the following findings:

(1) The council finds that the practice of denying equal opportunities in employment, education, access to and use of public accommodations, and acquisition of real estate based on race, color, religion, ancestry, national origin, handicap, or sex is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the policies contained herein and shall be considered discriminatory practices.

(2) Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute

* To facilitate quick reference to the pertinent provisions of the ordinance, petitioner has underscored all language relating specifically to pornography.

significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.

(b) It is the purpose of this chapter to carry out the following policies of the City of Indianapolis and Marion County:

(1) To provide equal employment opportunity in all city and county jobs without regard to race, color, religion, handicap, national origin, ancestry, age, sex, disabled veteran, or Vietnam era veteran status;

(2) To encourage the hiring of the handicapped in both the public and the private sectors and to provide equal access to the handicapped to public accommodations;

(3) To utilize minority-owned businesses, securing goods and services for the city and county in a dollar amount equal to at least ten (10) per cent of monies spent by the City of Indianapolis and Marion County;

(4) To utilize women-owned businesses and encourage the utilization of women in construction and industry;

(5) To protect employers, labor organizations, employment agencies, property owners, real estate brokers, builders, lending institutions, governmental and educational agencies and other persons from unfounded charges of discrimination;

(6) To provide all citizens of the City of Indianapolis and Marion County equal opportunity for education, employment, access to public accommodations without regard to race, religion, color, handicap, sex, national origin, ancestry, age, or disabled veteran or Vietnam era veteran status;

(7) To provide all citizens of the City of Indianapolis and Marion County equal opportunity for

acquisition through purchase or rental of real property including, but not limited to, housing without regard to race, sex, religion or national origin; and

(8) To prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography.

Sec. 16-2. Nondiscrimination clauses.

(1) Every contract to which one of the parties is the city or the county, or any board, department or office of either the city or county, including franchises granted to public utilities, shall contain a provision requiring the governmental contractor and subcontractors not to discriminate against any employee or applicant for employment in the performance of the contract, with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, sex, religion, color, national origin, ancestry, age, handicap, disabled veteran status and Vietnam era veteran status. Breach of this provision may be regarded as a material breach of the contract.

(2) All applications, postings, announcements, and advertisements recruiting applicants for employment with the city or county shall conspicuously post in the bottom margin of such recruiting bids a clause as follows: "An Affirmative Action Equal Employment Opportunity Employer."

Sec. 16-3. Definitions.

As used in this chapter, the following terms shall have the meanings ascribed to them in this section:

(a) *Acquisition of real estate* shall mean the sale, rental, lease, sublease, construction or financing, including negotiations and any other activities or procedures incident thereto, of:

(1) Any building, structure, apartment, single room or suite of rooms or other portion of a building, occupied as or designed or intended for occupancy as living quarters by one or more families or single individuals;

(2) Any building, structure or portion thereof, or any improved or unimproved land utilized or designed or intended for utilization, for business, commercial, industrial or agricultural purposes;

(3) Any vacant or unimproved land offered for sale or lease for any purpose whatsoever.

(b) *Appointing authorities* shall mean and include the mayor, city-county council and such other person or agency as may be entitled to appoint any member of the equal opportunity advisory board created in this chapter.

(c) *Appraiser* shall mean any person who, for a fee or in relation to his/her employment or usual occupation, establishes a value for any kind of real estate, the acquisition of which is defined in this section.

(d) *Board* shall mean the equal opportunity advisory board.

(e) *Complainant* shall mean any person who signs a complaint on his/her own behalf alleging that he/she has been aggrieved by a discriminatory practice.

(f) *Complaint* shall mean a written grievence filed with the office of equal opportunity, either by a complainant or by the board or office, which meets all the requirements of sections 16-18 and 16-19.

(g) *Discriminatory practice* shall mean and include the following:

(1) The exclusion from or failure or refusal to extend to any person equal opportunities or any difference in the treatment of any person by

reason of race, sex, religion, color, national origin or ancestry, handicap, age, disabled veteran or Vietnam era veteran status.

(2) The exclusion from or failure or refusal to extend to any person equal opportunities or any difference in the treatment of any person, because the person filed a complaint alleging a violation of this chapter, testified in a hearing before any members of the board or otherwise cooperated with the office or board in the performance of its duties and functions under this chapter, or requested assistance from the board in connection with any alleged discriminatory practice, whether or not such discriminatory practice was in violation of this chapter.

(3) In the case of a real estate broker or real estate salesperson or agent, acting in such a capacity in the ordinary course of his/her business or occupation, who does any of the following:

a. Any attempt to prevent, dissuade or discourage any prospective purchaser, lessee or tenant of real estate from viewing, buying, leasing or renting the real estate because of the race, sex, religion or national origin of:

1. Students, pupils or faculty of any school or school district;

2. Owners or occupants, or prospective owners or occupants, of real estate in any neighborhood or on any street or block; provided, however, this clause shall not be construed to prohibit disclosure in response to inquiry by any prospective purchaser, lessee or tenant of:

(i) Information reasonably believed to be accurate regarding such race, sex, religion or national origin; or

(ii) The honest professional opinion or belief of the broker, salesperson or agent regarding factors which may affect the value or desirability of property available for purchase or lease.

b. Any solicitation, promotion or attempt to influence or induce any owner to sell, lease or list for sale or lease any real estate, which solicitation, promotion or attempted inducement includes representations concerning:

1. Race, sex, religion or national origin or present, prospective or possible purchasers or occupants of real estate in any area, neighborhood or particular street or block;

2. Present, prospective or possible neighborhood unrest, tension or change in the race, sex, religion or national origin of occupants or prospective occupants of real estate in any neighborhood or any street or block;

3. Present, prospective or possible decline in market value of any real estate by reason of the present, prospective or possible entry into any neighborhood, street or block of persons of a particular race, sex, religion or national origin;

4. Present, prospective or possible decline in the quality of education offered in any school or school district by reason of any change in the race, sex, religion or national origin of the students, pupils or faculty of such school or district.

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.

a. City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography, but special display presentations of pornography in said places is sex discrimination.

b. The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

c. This paragraph (4) shall not be construed to make isolated passages or isolated parts actionable.

(5) Coercion into pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography, which injury may date from any appearance or sale of any products of such performance.

a. Proof of the following facts or conditions shall not constitute a defense:

1. That the person is a woman; or

2. That the person is or has been a prostitute; or

3. That the person has attained the age of majority; or

4. That the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or

5. That the person has previously had, or been thought to have had, sexual rela-

tions with anyone, including anyone involved in or related to the making of the pornography; or

6. That the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or

7. That anyone else, including a spouse or other relative, has given permission on the person's behalf; or

8. That the person actually consented to a use of the performance that is changed into pornography; or

9. That the person knew that the purpose of the acts or events in question was to make pornography; or

10. That the person demonstrated no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or

11. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or

12. That no physical force, threats, or weapons were used in the making of the pornography; or

13. That the person was paid or otherwise compensated.

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child, or transsexual in an [sic] way that is directly caused by specific pornography.

(8) Defenses: Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of section 16-3.

(h) *Education* shall mean the construction, maintenance or operation of any school or educational facility utilized or intended to be utilized for the education or training of persons residing within the territorial jurisdiction of the office and controlled by a public governmental board or agency which operates one or more elementary or secondary schools.

(i) *Employer* shall mean:

(1) Any political subdivison within the county, not represented by the corporation counsel, pursuant to IC 18-4-7-5, and any separate municipal corporation which has territorial jurisdiction primarily within the county; and

(2) Any person who employs at the time of any alleged violation six (6) or more employees within the territorial jurisdiction of the office.

(j) *Employment* shall mean a service performed by an individual for compensation on behalf of an employer, except that such services shall not include the following:

(1) Services performed by an individual who in fact is engaged in an independently established trade, occupation, business or profession, and who has been and will continue to be free from direction or control over the manner of performance of such services;

(2) Services performed by an agent who receives compensation solely upon a commission basis and who controls his/her own time and efforts; or

(3) Services performed by an individual in the employ of his/her spouse, child or parent.

(k) *Employment agency* shall mean and include any person undertaking, with or without compensation, to procure, recruit, refer or place any individual for employment.

(l) *Labor organization* shall mean and include any organization which exists for the purpose, in whole or in part, of collective bargaining or dealing with employers concerning grievances, terms or conditions of employment, or for other mutual aid or protection in relation to employment.

(m) *Lending institution* shall mean any bank, building and loan association, insurance company or other corporation, association, firm or enterprise, the business of which consists in whole or in part in making or guaranteeing loans, secured by real estate or any interest therein.

(n) *Office* shall mean the office of equal opportunity created by this chapter.

(o) *Owner* shall mean and include the title holder of record, a contract purchaser, lessee, sublessee, managing agent or other person having rights of

ownership or possession, or the right to sell, rent or lease real estate.

(p) *Person* shall mean and include one or more individuals, partnerships, associations, organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy. receivers, governmental agencies and other organized groups of persons.

(q) *Pornography* shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humilitation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degredation [sic], injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

(r) *Public accommodation* shall mean an establishment which caters to or offers its services, facilities or goods to the general public.

(s) *Public facility* shall mean any facility or establishment, other than an educational institution, which is owned, operated or managed by or on behalf of a governmental agency.

(t) *Real estate broker* shall mean any person who, for a fee or other valuable consideration, sells, purchases, rents, leases or exchanges, or negotiates or offers or attempts to negotiate the sale, purchase, rental, lease or exchange of real property owned by another person; or a person who is licensed and holds himself/herself out to be engaged in the business of selling, purchasing, renting, leasing or exchanging real property for other persons, or who manages and collects rents for the real property of another.

(u) *Real estate salesperson or agent* shall mean any person employed by a real estate broker to perform or assist in performing any or all of the functions of the real estate broker.

(v) *Respondent* shall mean one or more persons against whom a complaint is filed under this chapter, and who the complaint alleges has committed or is committing a discriminatory practice.

Sec. 16-4. Office of equal opportunity — Created; purpose.

There is hereby created a section of the legal division of the department of administration entitled the office of equal opportunity. This office and its board are empowered as provided in this chapter to carry out the public policy of the state as stated in section 2 of the Indiana Civil Rights Act, within the territorial boundaries of Marion County.

Sec. 16-5. Same — Composition of office; functions.

The office shall be directed by a chief officer who shall also be the affirmative action officer for the city and county. The chief officer shall be appointed by and serve at the pleasure of the mayor and shall be responsible for performing the following functions:

(1) To monitor internal employment practices as follows:

a. By ensuring that city and county government offers equal employment opportunities to persons regardless of race, religion, color, sex, national origin, ancestry, age, handicap, or disabled veteran or Vietnam era veteran status;

b. By providing a vehicle through which employees may seek redress for alleged discriminatory acts by city and county government and/or retaliatory acts by city or county government for filing or assisting in the discrimination complaint process;

c. By establishing affirmative action goals for city and county government;

d. By complying with federal reporting requirements concerning affirmative action and equal opportunity; and

e. By reviewing policies and procedures of the city and the county to eliminate discriminatory practices.

(2) To monitor contract compliance as follows:

a. By ensuring compliance with federal grant requirements respective to the utilization of minority business enterprises (MBE) and women business enterprises (WBE);

b. By reviewing city-county contracts to assure compliance with relevant federal, state and local laws and regulations on affirmative action and equal employment;

c. By functioning as a liaison between the city-county and its contractors by providing technical assistance in developing affirmative action goals and monitoring these compliance efforts to meet established goals; and

d. By managing and implementing the MBE/WBE programs, and by monitoring city and county purchasing as specified in section 16-1(3).

(3) To receive, investigate and adjudicate community complaints as specified in sections 16-18 through 16-28.

Section 16-6. Same — General powers and duties.

In addition to the functions previously mentioned in section 16-5, the office shall have the following powers and duties:

(1) To gather and distribute information for the purpose of improving human relations and removing inequities to protected groups in the areas of housing, recreation, education, employment, law enforcement, vocational guidance and related matters.

(2) To assist other governmental and private agencies, groups and individuals in reducing community tensions and preventing conflicts between persons of different racial, ethnic and religious groups.

(3) To discourage persons from engaging in discriminatory practices through informal methods of persuasion and conciliation and through programs of public information and education.

(4) To furnish techical assistance upon request to persons to assist them in eliminating discriminatory practices or otherwise implementing the policy and purposes of the Indiana Civil Rights Act.

(5) To make such general investigations, studies and surveys as the office shall deem necessary for the performance of its duties.

(6) To prepare and submit at least annually a report of its activities to the mayor and to the public, which

report shall describe the investigations and proceedings conducted by the office, the outcome thereof and the progress and achievements of the office and the community toward elimination of discriminatory practices.

(7) To cooperate with the Indiana State Civil Rights Commission, any appropriate federal, state or local agencies, and with private organizations, individuals and neighborhood associations in order to effectuate the purposes of this chapter and to further compliance with federal, state and local laws and ordinances prohibiting discriminatory practices.

(8) To perform any other duties assigned by ordinance or the mayor.

Sec. 16-7. Equal opportunity advisory board — Created; purpose.

There is hereby created an equal opportunity advisory board empowered as provided in this chapter to carry out the public policy of the state as stated in section 2 of the Indiana Civil Rights Act, within the territorial boundaries of Marion County.

Sec. 16-8. Same — Composition of board; appointment and terms of members.

(1) The board shall consist of twenty-two (22) members. Fourteen (14) members shall be appointed by the mayor and eight (8) members shall be appointed by the city-county council. In addition, the chief officer shall be an ex officio member of the board. In making appointments, the mayor and the city-county council shall consider the following:

(a) No more than seven (7) members of the board appointed by the mayor shall be from any one political party. No more than four (4) members of the board appointed by the city-county council shall be from any one political party.

(b) In making appointments to the board, the mayor and the city-county council shall take into consideration all interests in the community, including but not limited to age, racial, ethnic, sexual, religious and economic groups, business, labor, the handicapped and the general public.

(2) A board member may be removed for just cause, including nonattendance, by a two-thirds (2/3) vote of the board.

(3) In the event of the death, resignation or removal of any member of the board prior to the expiration of his/her term, the appointing authority shall make an appointment to fill the vacancy for the unexpired term of the member.

(4) In making the original appointments to the board, the mayor shall designate five (5) appointees to serve three-year terms; five (5) appointees to serve two-year terms and four (4) appointees to serve one-year terms; and the city-county council shall designate three (3) appointees to serve three-year terms; three (3) appointees to serve two-year terms and two (2) appointees to serve one-year terms. Subsequent appointments shall be for three-year terms beginning on the first day of January and ending three (3) years later on the last day of December. Any member of the board whose term has expired may continue in office until a successor has been appointed.

(5) The mayor shall appoint from the membership of the board, a chairperson who shall serve a one-year term and until his/her successor is appointed and qualified, but serves at the pleasure of the mayor.

(6) The chairperson shall appoint a vice-chairperson and a secretary to serve during his/her term of office.

Sec. 16-9. Same — Meetings; vote required for board action.

The board shall hold regular meetings every two (2) months on a day agreed upon by the board. The board shall

hold special meetings as may be called by two-thirds (2/3) of the membership. One-half (½) of the members of the board, excluding vacancies, shall constitute a quorum at any meeting. A majority vote of those in attendance shall be necessary for action, except in the case of a determination after hearing provided in section 16-26, when a majority of the members of the board not disqualified from participation in such determination shall be required. The chief officer shall not be allowed to vote, except in case of a tie, when the chief officer may cast the deciding vote.

Sec. 16-10. Same — General powers and duties.

The board shall have the following powers and duties:

(1) To appoint an executive committee, a majority of which shall constitute a quorum, which committee shall be authorized to act upon emergency matters between meetings of the board; provided, however, the executive committee shall not take any action inconsistent with action previously taken or policies adopted by the board, and the executive committee shall not exercise any of the powers or functions of the board under sections 16-17 through 16-27. All officers of any executive committee appointed by the board must be members of the board.

(2) To establish three (3) standing committees, composed of seven (7) board members each, to deal with the following subject matter:

a. Internal employment practices,

b. Contract compliance,

c. Complaint adjudication.

The chairperson shall appoint the board members to each committee. No board member shall serve on more than one committee. The chairperson shall be an ex officio member of each committee but have voting privileges only in case of a tie, when

he/she may cast the deciding vote. The board may establish any additional committees as in its judgment will aid the board in effectuating the purposes of this chapter.

(3) To advise the office in formulating policies designed to effectuate the purposes of this chapter and to make such recommendations to the mayor and the city-county council as the board shall deem appropriate to implement such policies.

(4) To adopt, amend and rescind procedural and substantive rules and regulations for the conduct of its affairs, not inconsistent with the provisions or intent and purposes of this chapter, as the board shall deem necessary or appropriate. The rules or regulations shall be adopted only after notice is given and a hearing is held thereon in the manner provided by state law relating to rule-making by state agencies. Any rule or regulation adopted by the board shall be submitted to the corporation counsel for approval as to legality. Upon approval by the corporation counsel, the board shall cause the rule or regulation to be printed or duplicated in such a manner as to be readily available to interested persons and the public, and shall thereupon file the original approved copy and one duplicate with the clerk and the clerk of any other city or town which has adopted this chapter. The rule or regulation shall be effective as of the date and time of filing the original approved copy with the clerk.

(5) To exercise such additional powers or functions as may be delegated to the board by ordinance or by executive order validly adopted and promulgated by the mayor of the consolidated city.

(6) To generally advise the office in the area of equal opportunity which shall include but not be limited to recommending new programs and program objectives, reviewing problem areas and recommending changes in existing programs.

Sec. 16-11. Same — Internal employment practices committee; duties.

(1) A committee on internal employment practices is hereby established. The committee shall be composed of seven (7) members of the board appointed by the chairperson of the board. The committee shall meet quarterly and at such other times as its members deem necessary. The committee shall have the power to establish and adopt rules for the conduct of its affairs.

(2) The duties of the internal employment practices committee shall include:

(a) To review employment policies and procedures of the city and county and make recommendations to eliminate discriminatory employment practices.

(b) To review internal employment programs in the area of equal employment opportunity and affirmative action and make recommendations concerning their effective and efficient operation.

(c) To provide recommendations for establishing and achieving affirmative action goals.

Sec. 16-12. Same — Contract compliance committee; duties.

(1) A committee on contract compliance is hereby established. The committee shall be composed of seven (7) members of the board. The committee shall meet quarterly and at such other times as the members of the committee shall deem necessary. The committee shall have the power to establish and adopt rules for the conduct of its affairs.

(2) The duties of the contract compliance committee shall include:

(a) To review contract compliance procedures and make recommendations concerning their effective and efficient operation.

(b) To make recommendations for improving the

utilization of minority and women businesses by the city and county.

Sec. 16-13. Complaint adjudication; territorial application.

This chapter shall apply within the territorial limits of the consolidated city and within the territorial limits of the county, with respect to any discriminatory practice occurring within such territorial limits and which relates to:

(1) Acquisition of real estate; or

(2) Employment; or

(3) Education controlled by any public board of [sic] agency; or

(4) Public accommodations; or

(5) Pornography.

Sec. 16-14. Unlawful acts other than discriminatory practices; penalty.

(a) It shall be unlawful for any person to discharge, expel or otherwise discriminate against any other person because that person:

(1) Has filed a complaint alleging a violation of section 16-15;

(2) Has testified in a hearing before the board or any committee thereof;

(3) Has otherwise cooperated with the board or office in the performance of their duties and functions;

(4) Has requested assistance from the board or office in connection with any alleged discriminatory practice, whether or not the discriminatory practice was in violation of section 16-15.

(b) It shall be unlawful for any person willfully to file a complaint alleging a violation of section 16-15 with

knowledge that the complaint is false in any material respect.

(c) Any person who violates any of the provisions of this section shall, upon conviction, be subject to fine in an amount not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00); provided, however, no such fine shall be imposed upon any person against whom the board or office has proceedings under this chapter with respect to any violation of subsection (a), which violation is also a discriminatory practice. Any proceeding to impose a penalty under this section shall be commenced within six (6) months after the date the violation occurred.

Sec. 16-15. Discriminatory practices declared unlawful.

Each discriminatory practice as defined in section 16-3 shall be considered unlawful unless it is specifically exempted by this chapter.

Sec. 16-16. Persons and activities to which sections 16-14 and 16-15 do not apply.

(a) Sections 16-14 and 16-15 shall not apply to employment performed for the consolidated city and department or agency thereof, or any employment performed for the county or agency thereof which is represented by the corporation counsel pursuant to IC 18-4-7-5.

(b) Subject to the provisions of section 16-3(g)(4), the provisions of sections 16-14 and 16-15 shall not include any not-for-profit corporation or association organized exclusively for fraternal or religious purposes, nor any school, education, charitable or religious institution owned or conducted by, or affiliated with, a church or religious institution, nor any exclusively social club, corporation or association that is not organized for profit and is not in fact open to the general public.

(c) Sections 16-14 and 16-15 shall not apply to the rental

of rooms in a boardinghouse or rooming house or single-family residential unit; provided, however, the owner of the building unit actually maintains and occupies a unit or room in the building as his/her residence and, at the time of the rental the owner intends to continue to so occupy the unit or room therein for an indefinite period subsequent to the rental.

(d) The following shall not be discrimination on the basis of sex:

(1) For any person to maintain separate restrooms or dressing rooms for the exclusive use of either sex;

(2) For an employer to hire and employ employees; for an employment agency to classify or refer for employment any individual; for a labor organization to classify its membership or to classify or refer for employment any individual; or for an employer, labor organization or joint labor-management committee, controlling apprenticeship or other training or retraining programs, to admit or employ any individual in any such program; on the basis of sex in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Sec. 16-17. Grounds for complaint; persons who may file; persons against whom complaint may be made.

(a) A complaint charging that any person has engaged in or is engaging in a discriminatory practice prohibited by sections 16-14 and/or 16-15 may be filed with the office by any person claiming to be aggrieved by the practice, or by one or more members of the board of employees of the office who have reasonable cause to believe that a violation of sections 16-14 and 16-15 has occurred, in any of the following circumstances:

(1) In the case of the acquisition of real estate, against the owner of the real estate, a real estate broker,

real estate salesperson or agent, or a lending institution or appraiser;

(2) In the case of education, against the governing board of any public school district which operates schools within the territorial limits of the consolidated city or of the county;

(3) In the case of a public accommodation, against the owner or person in charge of any such establishment, or both;

(4) In the case of a public facility, against the governmental body which operates or has jurisdiction over the facility;

(5) In the case of employment, against any employer, employment agency or labor organization;

(6) In the cases of trafficking in pornography, coercion into pornographic performances, and assault or physical attack due to pornography (as provided in section 16-3(g)(7)) against the perpetrator(s), maker(s), seller(s), exhibitor(s), or distributor(s).

(7) In the case of forcing pornography on a person, against the perpetrator(s) and/or institution.

(b) In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man, child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to obtain relief under this chapter.

(c) In the case of assault or physical attack due to pornography, compensation for losses or an award of damages shall not be assessed against:

(1) Maker(s), for pornography made.

(2) Distributor(s), for pornography distributed.

(3) Seller(s), for pornography sold, or

(4) Exhibitor(s) for pornography exhibited, prior to the effective date of this act.

Sec. 16-18. Contents of complaint.

To be acceptable by the office, a complaint shall be sufficiently complete so as to reflect properly the full name and address of the complainant or other aggrieved person or persons; the full name and address of the person against whom the complaint is made; the alleged discriminatory practice and a statement of particulars thereof; the date or dates of the alleged discriminatory practice; if the alleged discriminatory practice is of a continuing nature, the dates between which the continuing discriminatory practices are alleged to have occurred; a statement as to any other action, civil or criminal, instituted before any other administrative agency, commission, department or court, whether state or federal, based upon the same grievance alleged in the complaint, with a statement as to the status or disposition of any such other action; and in the case of alleged employment discrimination a statement that the employer employs six (6) or more employees in the territorial jurisdiction of the office.

Sec. 16-19. Execution and verification of complaint.

The original complaint shall be signed and verified before a notary public or other person duly authorized by law to administer oaths and take acknowledgements. Notarial services shall be furnished by the office without charge.

Sec. 16-20. Timeliness of complaint.

No complaint shall be valid unless filed within ninety (90) calendar days from the date of occurrence of the alleged discriminatory practice or, in the case of a continuing discriminatory practice, during the time of the occurrence of the alleged practice; but not more than ninety (90) calendar

days from the date of the most recent alleged discriminatory act.

Sec. 16-21. Referral of complaint to Indiana State Civil Rights Commission.

The chief officer may, in his/her discretion, prior to scheduling of the complaint for hearing under section 16-26, refer any complaint to the Indiana State Civil Rights Commission for proceedings in accordance with the Indiana Civil Rights Act.

Sec. 16-22. Receipt of complaint from Indiana State Civil Rights Commission.

The office is hereby authorized to receive any complaint referred to it by the Indiana State Civil Rights Commission pursuant to section 11a of the Indiana State Civil Rights Act, and to take such action with respect to any such complaint as is authorized or required in the case of a complaint filed under section 16-17.

Sec. 16-23. Service of complaint or respondent; answer.

The chief officer shall cause a copy of the complaint to be served by certified mail upon the respondent, who may file a written response to the complaint at any time prior to the close of proceedings with respect thereto, except as otherwise provided in section 16-26. The complaint and any response received shall not be made public by the chief officer, the board or any member thereof or any agent or employee of the office, unless and until a public hearing is scheduled thereon as provided in section 16-26.

Sec. 16-24. Investigation and conciliation.

(1) *Investigation.* Within ten (10) working days after the receipt of a complaint filed pursuant to this chapter, the chief officer shall initiate an investigation of the alleged

discriminatory practice charged in the complaint. All such investigations shall be made by the office at the direction of the chief officer and may include informal conferences or discussions with any party to the complaint for the purpose of obtaining additional information or attempting to resolve or eliminate the alleged discriminatory practice by conciliation or persuasion. The office shall have the authority to initiate discovery, including but not limited to interrogatories, request for production of documents and subpoenas, on approval of the chief officer at any time within ten (10) working days after filing of a complaint. Any request by the office to compel discovery may be by appropriate petition to the Marion County circuit or superior courts.

(2) *Report of investigation; determination by panel.* Unless the complaint has been satisfactorily resolved prior thereto, the chief officer shall, within thirty (30) working days after the date of filing of a complaint pursuant to section 16-17, report the results of the investigation made pursuant to subsection (1) to a panel of three (3) members of the board designated by the chairperson or vice-chairperson or pursuant to the rules of the board, which panel shall not include any member of the board who initiated the complaint, who might have participated in the investigation of the complaint, or who is a member of the complaint adjudication committee. The chief officer shall make a recommendation as to whether there is reasonable cause to believe that the respondent has violated sections 16-14 and/or 16-15. The chairperson, vice-chairperson or such other member of the panel so designated may, for good cause shown, extend the time for making such report. Such extension thereof shall be evidenced in writing, and the office shall serve a copy of the extension on both the complainant and the respondent. The panel shall then determine by majority vote whether reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15. In making such a determination, the panel

shall consider only the complaint, the response, if any, and the chief officer's report; provided, however, the panel may request the chief officer to make a supplemental investigation and report with respect to any matter which it deems material to such determination.

(3) *Action when violation found.* If the panel, pursuant to subsection (2) determines that reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15, it may direct the chief officer to endeavor to eliminate the alleged discriminatory practice through a conciliation conference. At least one panel member shall be present at any conciliation conference at which both the complainant and respondent are present or represented. If the complaint is satisfactorily resolved through conciliation, the terms of any agreement reached or undertaking given by any party shall be reduced to writing and signed by the complainant, respondent and the chief officer. Any disagreement between the respondent and the chief officer in regard to the terms or conditions of a proposed conciliation agreement may be referred to the panel which considered the complaint, and the decision of the panel with respect to such terms or conditions shall be final for purposes of conciliation proceedings under this subsection, but shall not be binding upon the respondent without his written consent thereto. No action taken or statement made in connection with any proceedings under this subsection, and no written conciliation agreement or any of the terms thereof, shall be made public by the board or any member thereof, or any agent or employee of the officer, without the written consent of the parties, nor shall any such action, statement or agreement be admissible in evidence in any subsequent proceedings; provided, however, the board or officer may institute legal proceedings under this chapter for enforcement of any written agreement or undertaking executed in accordance with this subsection.

Sec. 16-25. Complaint adjudication committee; duties.

A complaint adjudication committee is hereby established. The committee shall be composed of seven (7) members of the board. The committee shall meet for the purpose of holding public hearings on citizens' complaints, which shall be at such times as its members deem necessary.

Sec. 16-26. Hearings, findings and recommendations when conciliation not effected.

(a) *Hearing to be held; notice.* If a complaint filed pursuant to this article has not been satisfactorily resolved within a reasonable time through informal proceedings pursuant to section 16-24, or if the panel investigating the complaint determines that a conciliation conference is inappropriate under the circumstances surrounding the complaint, the complaint adjudication committee may hold a public hearing thereon upon not less than ten (10) working days' written notice to the complainant or other aggrieved person, and to the respondent. If the respondent has not previously filed a written response to the complaint, he/she may file such response and serve a copy thereof upon the complainant and the office not later than five (5) working days prior to the date of the hearing.

(b) *Powers; rights of parties at hearing.* In connection with a hearing held pursuant to subsection (a), the complaint adjudication committee shall have power, upon any matter pertinent to the complaint or response thereto, to subpoena witnesses and compel their attendance; to require the production of pertinent books, papers or other documents; and to administer oaths. The complainant shall have the right to be represented by the chief officer or any attorney of his/her choice. The respondent shall have the right to be represented by an attorney or any other person of his/her choice. The complainant and respondent shall

have the right to appear in person at the hearing, to be represented by an attorney or any other person, to subpoena and compel the attendance of witnesses, and to examine and cross-examine witnesses. The complaint adjudication committee may adopt appropriate rules for the issuance of subpoenas and the conduct of hearings under this section. The complaint adjudication committee and the board shall have the power to enforce discovery and subpoenas by appropriate petition to the Marion County circuit or superior courts.

(c) *Statement of evidence; exceptions; arguments.* Within thirty (30) working days from the close of the hearing, the complaint adjudication committee shall prepare a report containing written recommended findings of fact and conclusions and file such report with the office. A copy of the report shall be furnished to the complainant and respondent, each of whom shall have an opportunity to submit written exceptions within such time as the rules of the complaint adjudication committee shall permit. The complaint adjudication committee may, in its discretion, upon notice to each interested party hear further evidence or argument upon the issues presented by the report and exceptions, if any.

(d) *Findings of fact; sustaining or dismissing complaint.* If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has engaged or is engaging in a discriminatory practice in violation of the chapter, it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent. In addition, the committee may cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice and requiring such person to take further affirmative action as will effectuate the purposes of this chapter, including but not limited to the power to restore complainant's losses incurred as a result of discriminatory treatment, as the committee may deem

necessary to assure justice; to require the posting of notice setting forth the public policy of Marion County concerning equal opportunity and respondent's compliance with said policy in places of public accommodations; to require proof of compliance to be filed by respondent at periodic intervals; to require a person who has been found to be in violation of this chapter and who is licensed by a city or county agency authorized to grant a license, to show cause to the licensing agency why his license should not be revoked or suspended. If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has not engaged in a discriminatory practice in violation of this chapter it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent, and dismiss the complaint. Findings and conclusions made by the committee shall be based solely upon the record of the evidence presented at the hearing.

(e) *Appeal to the board.* Within thirty (30) working days after the issuance of findings and conclusions by the committee, either the complainant or the respondent may file a written appeal of the decision of the committee to the board; however, in the event that the committee requires a respondent to correct or eliminate a discriminatory practice within a time period less than thirty (30) working days, then that respondent must file his/her appeal within that time period. After considering the record of the evidence presented at the hearing and the findings and conclusions of the committee, the board may affirm the decision of the committee and adopt the findings and conclusions of the committee, or it may affirm the decision of the committee and make supplemental findings and conclusions of its own, or it may reverse the decision of the committee and make findings of fact and conclusions to support its decision. The board may also adopt, modify or reverse any relief ordered by the committee. The board must take any of the above actions within thirty (30) working days after the appeal is filed.

(f) *Members of board who are ineligible to participate.* No member of the board who initiated a complaint under this chapter or who participated in the investigation thereof shall participate in any hearing or determination under this section as a member of either a hearing panel, the complaint adjudication committee or of the board.

(g) *Applicability of state law; judicial review.* Except as otherwise specifically provided in this section or in rules adopted by the board or the complaint adjudication committee under this chapter, the applicable provisions of the Administrative Adjudication Act, IC 4-22-1, shall govern the conduct of hearings and determinations under this section, and findings of the board hereunder shall be subject to judicial review as provided in that act.

Sec. 16-27. Court enforcement.

(a) *Institution of action.* In any case where the board or the committee has found that a respondent has engaged in or is engaging in a discriminatory practice in violation of sections 16-14 and/or 16-15, and such respondent has failed to correct or eliminate such discriminatory practice within the time limit prescribed by the board or the committee and the time limit for appeal to the board has elapsed, the board may file in its own name in the Marion County circuit or superior courts a complaint against the respondent for the enforcement of section 16-26. Such complaint may request such temporary or permanent injunctive relief as may be appropriate and such additional affirmative relief or orders as will effectuate the purposes of this chapter and as may be equitable, within the powers and jurisdiction of the court.

(b) *Record of hearing; evidentiary value.* In any action filed pursuant to this section, the board may file with the court a record of the hearing held by the complaint adjudication committee pursuant to section 16-26, which record shall be certified by the secretary of the board as a

true, correct and complete record of the proceedings upon which the findings of the complaint adjudication committee and/or the board were based. The court may, in its discretion, admit any evidence contained in the record as evidence in the action filed under subsection (a), to the extent such evidence would be admissible in court under the rules of evidence if the witness or witnesses were present in court, without limitation upon the right of any party to offer such additional evidence as may be pertinent to the issues and as the court shall, in its discretion, permit.

(c) *Temporary judicial relief upon filing of complaint.* Upon the filing of a complaint pursuant to section 16-17 by a person claiming to be aggrieved, the chief officer, in the name of the board and in accordance with such procedures as the board shall establish by rule, may seek temporary orders for injunctions in the Marion County circuit or superior courts to prevent irreparable harm to the complainant, pending resolution of the complaint by the office, complaint adjudication committee and the board.

(d) *Enforcement of conciliating agreements.* If the board determines that any party to a conciliation agreement approved by the chief officer under section 16-24 has failed or refused to comply with the terms of the agreement, it may file a complaint in the name of the board in the Marion County circuit or superior courts seeking an appropriate decree for the enforcement of the agreement.

(e) *Trial de novo upon finding of sex discrimination related to pornography.* In complaints involving discrimination through pornography, judicial review shall be de novo. Notwithstanding any other provision to the contrary, whenever the board or committee has found that a respondent has engaged in or is engaging in one of the discriminatory practices set forth in paragraph (g)(4) of section 16-3 or as against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, the board shall, within ten (10) days after making such finding, file in its own name in the Marion County circuit or superior court an

action for declaratory and/or injunctive relief. The board shall have the burden of proving that the actions of the respondent were in violation of this chapter.

Provided, however, that in any complaint under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3 no temporary or permanent injunction shall issue prior to a final judicial determination that said activities of respondent do constitute a discriminatory practice under this chapter.

Provided further, that no temporary or permanent injunction under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3 shall extend beyond such material(s) that, having been described with reasonable specificty by the injunction, have been determined to be validly proscribed under the chapter.

Sec. 16-28. Other remedies.

Nothing in this chapter shall affect any person's right to pursue any and all rights and remedies available in any other local, state or federal forum.

INDIANAPOLIS CITY-COUNTY COUNCIL GENERAL ORDINANCE NO. 35, 1984, SECTION 7 & SECTION 8*

SECTION 7. (a) Because this ordinance amends certain provisions adopted in General Ordinance No. 24, 1984, the effective date of that ordinance is postponed until the effective date of this ordinance. (b) The expressed or implied repeal or amendment, by General Ordinance No. 24, 1984, or by this ordinance, of any other ordinance or

* These sections were not included in the codification of Indianapolis City-County General Ordinance No. 35, 1984 in the Code of Indianapolis and Marion County, Indiana, Chapter 16. It is a policy of the Indianapolis City-County Council not to codify sections of ordinances regarding effective dates and severability.

part of any other ordinance does not affect any rights or liabilities accrued, penalties incurred, or proceedings begun prior to the effective date of this ordinance. Those rights, liabilities, and proceedings are continued, and penalties shall be imposed and enforced under the repealed or amended ordinance as if this ordinance or General Ordinance No. 24, 1984, had not been adopted. (c) An offense, committed before the effective date of this ordinance, under any ordinance expressly or impliedly repealed or amended by this ordinance shall be prosecuted and remains punishable under the repealed or amended ordinance as if this ordinance had not been adopted.

SECTION 8. Should any provision (section, paragraph, sentence, clause, or any other portion) of this ordinance be declared by a court of competent jurisdiction to be invalid for any reason, the remaining provisions shall not be affected unless such remaining provisions clearly cannot, without the invalid provision or provisions, be given the effect intended by the council in adopting this ordinance. It is further declared to be the intent of the City-County Council that the ordinance be upheld as applied to the graphic depiction of actual sexual subordination whether or not upheld as applied to material produced without the participation of human subjects nor shall a judicial declaration that any provision (section, paragraph, sentence, clause or any other portion) of this ordinance cannot validly be applied in a particular manner or to a particular case or category of cases affect the validity of that provision (section, paragraph, sentence, clause or any other portion) as applied in other ways or to other categories of cases unless such remaining application would clearly frustrate the Council's intent in adopting this ordinance. To this end, the provisions of this ordinance are severable.

No. 85-1090

Supreme Court, U.S.
FILED
JAN 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis; THE CITY OF INDIANAPOLIS; THE COUNTY OF MARION; THE DEPARTMENT OF ADMINISTRATION OF THE CITY OF INDIANAPOLIS; OFFICE OF EQUAL OPPORTUNITY OF THE CITY OF INDIANAPOLIS; EQUAL OPPORTUNITY ADVISORY BOARD OF THE CITY OF INDIANAPOLIS; and JOSEPH McATEE, Chief of Police; STEPHEN GOLDSMITH, Marion County Prosecutor, and JAMES WELLS, Marion County Sheriff,

Appellants,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS; FREEDOM TO READ FOUNDATION; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., KOCH NEWS COMPANY; NATIONAL ASSOCIATION OF COLLEGE STORES, INC.; OMEGA SATELLITE PRODUCTS CO.; VIDEO SHACK, INC.; and KELLY BENTLEY,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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APPELLEES' MOTION TO AFFIRM OR DISMISS

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The following information is supplied pursuant to Rule 28.1 of the Rules of this Court:

Plaintiff-Appellee Koch News Co. has been succeeded by Indiana Periodicals Distributor, Inc. since the completion of the proceedings below. To avoid confusion we will continue to refer to Koch News Co. by its original name, which was the one used in the pleadings below. Buckeye News Co. is the parent company of Indiana Periodicals Distributor, Inc.

Plaintiff-Appellee Omega Satellite Products Co. has the following affiliates:

Bluffton Cable TV
Cable Brazil
Cablevision Alma
Cablevision Ludington
Cablevision Mt. Pleasant
Cablevision St. John's
Cardinal Telecable
Clear Channels Cable TV
Decatur Cable
DeKalb Cable
Diamond Lake Cable
Hoppeston Cable TV
Hoosier Hills Cable TV
Mineral Area Cablevision
Omega of Brown County
Omega of Michigan Cable
Omega of Zionsville Cable
Paw Paw Lake Cable
Rollo Cable Systems Inc.
See-More TV Company
Omega Satellite Products Company of Indianapolis
Omega Satellite Products Company of Mt. Pleasant

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Selected Provisions of the Code of Indianapolis and Marion County, Indiana[1]

Sec. 16-3(q) "Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section."

Sec. 16-3(g) "*Discriminatory practice* shall mean . . .

* * *

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.

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[1] The entire text of the Amendment is reprinted as Appendix E to the Jurisdictional Statement.

(5) Coercion into pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography, which injury may date from any appearance or sale of any products of such performance.

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child or transsexual in a way that is directly caused by specific pornography.

(8) Defenses: Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination: provided, however, that in the cases under (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of section 16-3."

Sec. 16-17(b). "In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man, child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to obtain relief under this chapter."

Motion and Summary of Argument

The Amendment uses a sweeping, unconstitutionally vague, content-based standard effectively to ban the production, sale, exhibition, and distribution of a vast range of non-obscene works that the appellants find offensive. The decisions of the courts below holding the Amendment to be unconstitutional are unassailable. The incurable vagueness of the provisions of the Amendment, as well as its unprecedented and constitutionally impermissible restriction on materials conceded to be within the protection of the First Amendment, mandate affirmance of the judgment below. The appellees move to dismiss the appeal and affirm the judgment below on the grounds that the rulings below are constitutionally correct and this appeal presents no substantial federal question for review.

Statement of the Case

City-County General Ordinances No. 24 and 35, 1984 amending the Human Relations and Equal Opportunity Law appearing in Chapter 16 of the Code of Indianapolis and Marion County (the "Amendment") attempt, by threat of civil sanction, fines and damages, to accomplish what cannot be done directly by criminal law. The Amendment restricts the availability, through the use of a censorship board, of materials that depict or constitute the "sexually explicit subordination of women."[2] Incorporated as part of the Indianapolis-Marion County Civil Rights Law, the Amendment adds new categories of "discriminatory practices" relating to "pornography" (which term is defined with no relationship to its usual meaning), and declares as "unlawful" (§ 16-15) most acts done in connection with the production, sale, exhibition or distribution of such materials.

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[2] . . . whatever that means. See *infra* Point I.

The unique definition of "pornography" (§ 16-3(q)) includes written and pictorial works, as well as speech—whether or not they are protected by the First Amendment—where women are "presented as sexual objects who enjoy pain or humiliation" (§ 16-3(q)(1)), or are depicted as "sexual objects tied up or cut up or mutilated or bruised or physically hurt" (§ 16-3(q)(3)), or are shown in "scenarios of degradation, bleeding, bruised, or hurt in a context that makes these conditions sexual" (§ 16-3(q)(5)). The presentation of women "as sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility or submission or display" is also "pornography" (§ 16-3(q)(6)). To compound the overbreadth and incomprehensibility of this section, the word "women" is said also to apply to "men, children or transsexuals" (§ 16-3(q)).

Virtually everything done in connection with "pornography" is declared unlawful as a "discriminatory practice" (§ 16-15). The restriction specifically prohibits anyone from:

a. producing, selling, exhibiting or distributing "pornography" (§ 16-3(g)(4));

b. coercing, intimidating or fraudulently inducing any person to perform in "pornography" (§ 16-3(g)(5)); or

c. forcing "pornography" upon anyone in a place of employment, education, in a home or any public place (§ 16-3(g)(6)).

Aggrieved persons—including the undefined "woman acting against the subordination of women" (§ 16-17(b))—may file a complaint with either the Board (§ 16-17) or Court (§ 16-28) in order to test the lawfulness of a partic-

ular printed, spoken or visual expression. Then, without reference to any constitutional standards whatsoever, a determination may be made as to whether the expression in question constitutes "pornography" under the Amendment, a positive finding possibly resulting in the issuance of a cease and desist order against further sale, distribution or performance, and the awarding of monetary damages (§ 16-26(d)).

The Amendment also contains a separate provision that establishes a new tort intended to compensate women who have been assaulted (whether or not the assault was criminal in nature) at the expense of legitimate publishers, distributors, sellers, authors and exhibitors of non-obscene materials (§ 16-3(g)(7)). An injured woman—if she can mount a colorable claim that her injury resulted from a specific publication, movie performance, speech, etc.—may sue for damages anyone connected with the creation or distribution of that expression. Specifically what damages are recoverable, or how they are to be proved, is nowhere disclosed.

Finally, whenever a complaint is filed, the Board, acting as a super-regulatory authority, may conduct an independent investigation invoking wide-ranging and ill-defined powers (§ 16-24(1)). It not only may communicate directly with parties charged with a violation, but also may use its governmental position:

> ". . . for the purpose of . . . attempting to resolve or eliminate the alleged discriminatory practice by conciliation or persuasion" (§ 16-24(1)).

If such coercive tactics are unsuccessful, the results of the investigation may be turned over to a panel of the Board for further action (§ 16-24(3)).

On May 1, 1984, prior to the effective date of the Amendment, plaintiffs commenced this action for injunctive and declaratory relief. Preliminary injunctive relief was granted. On June 22, 1984, plaintiffs moved for summary judgment. Oral argument was held on July 30, 1984. On November 19, 1984 the district court (Barker, J.) granted plaintiffs' motion for summary judgment, declared the Amendment "to be unconstitutional, void and of no effect," enjoined enforcement of the Amendment and awarded reasonable attorneys' fees to plaintiffs. The district court found that the Amendment regulates First Amendment protected speech (App. at B-31-32); that the regulation does not fall within any of the permitted exceptions to First Amendment protection (App. at B-38); that the state's interest in eradicating sex discrimination does not justify a new exception (App. at B-42); that the Amendment is unconstitutionally vague (App. at B-46); and that the procedural scheme of the Amendment constitutes an unconstitutional prior restraint (App. at B-51).

Defendants appealed to the Court of Appeals for the Seventh Circuit. On August 27, 1985 that court, in a scholarly opinion by Easterbrook, C.J., joined in by Cudahy, C.J., affirmed the order of the district court; Swygert, S.C.J., while concurring in the opinion, disassociated himself from certain dicta. A petition for rehearing with suggestion for rehearing *en banc* was denied on September 20, 1985.

The Appellees

The appellees publish, produce, distribute, sell and lend books, magazines, and other printed and visual materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. is the major national association of booksellers in the United States. It has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations.

The Council for Periodical Distributors Associations is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the rights of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and

periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Koch News Company is the largest wholesale distributor in Indianapolis of periodicals, hardback and paperback books, Bibles, school and children's books.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,800 college stores located throughout the United States.

Omega Satellite Products Co. is a distributor in Indianapolis of television programming received from satellite transmissions.

Video Shack, Inc. sells and rents motion pictures and other programming on video cassettes at three retail locations in Indianapolis.

Kelly Bentley is an adult resident and citizen of Indianapolis, and a reader and viewer of First Amendment protected material.

POINT I

THE LOWER COURTS PROPERLY FOUND THAT THE AMENDMENT IS IRRETRIEVABLY AND UNCONSTITUTIONALLY VAGUE.

All provisions of the Amendment have as their common denominator the Amendment's definition of "pornography." The extraordinary vagueness of that definition mandates that the entire Amendment be stricken, and thus the rulings below are correct.

"Pornography" is defined in the Amendment as "graphic sexually explicit subordination of women, whether in

pictures or in words, that also includes one or more of the following:

"(1) Women are presented as sexual objects who enjoy pain or humilitation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility or submission or display."

(§ 16-3(q))

The ambiguities in that definition are numerous, including:

1. "Pornography" is defined, in part, as "subordination of women," but the Amendment does not place that phrase in any context. Perhaps the City-County Council meant to provide that "pornography" is "materials" or "works" that depict "subordination," but that is not what they said, nor what the Amendment provides.

2. "Subordination" is not defined, even though it is the key word in the definition of "pornography." Subordina-

tion means different things to different people. Without any attempt to objectify the term, it is too ambiguous and subjective to have any real meaning. As the district court observed, is it "physical, social, psychological, religious, or emotional subordination or some other form or combination of these"? (App. at B-45)

3. "Subordination" is modified by the phrase "graphic sexually explicit," which is not defined.[3] (§ 16-3(q))

4. The six additional requirements for "pornography" described above are equally subjective and ambiguous, particularly the expressions "presented as sexual objects," "who enjoy . . . humiliation," "presented in scenarios of . . . abasement," "shown as . . . inferior", "conquest" and "postures or positions of servility or submission or display."

5. Further, the Amendment's proscriptions such as the one that makes "trafficking in pornography" (§ 16-31(g)(4)) a violation, are, when coupled with the definition of pornography, incomprehensible. The trafficking section provides that the production, sale, exhibition or distribution of "subordination" is unlawful.

For the key expression of an ordinance to have such significant ambiguities and problems mandates that the

[3] "Sexually explicit" was defined in the original amendment (§ 16-3(bb)), but the definition was deleted in the further amendment signed into law on June 15, 1984, after this action was commenced. The deleted definition stated that "sexually explicit shall mean actual or simulated:

(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between women and animals; or

(2) Uncovered exhibition of the genitals, pubic region, buttocks or anus of any person."

entire Amendment fall. Appellants repeatedly misrepresent the scope of the Amendment and cite materials that likely are obscene (and thus not protected by the First Amendment) to draw attention away from the fact that the Amendment is directed at a vast range of First Amendment protected materials that the supporters of the Amendment find personally offensive.

Appellants erroneously claim that the Amendment applies to materials that "are predominantly narrowed to the presentation of *violent and illegal* acts in a way that makes them erotic." Jur. St. at 12. This claim is simply false. The Amendment's trafficking provision and definition of "pornography" are not in any way restricted to pornography depicting violent and illegal acts.

The "defenses" section of the Amendment is equally incomprehensible. It states:

> "Defenses. Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6) or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of Section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (g)(6) of Section 16-3." (§ 16-3(g)(8))

A potential defendant cannot possibly know what his or her rights are under this provision. In their Jurisdictional Statement, as in their briefs to the lower courts, appellants

continue to revise and rewrite the meaning of the Amendment in ways nowhere to be found in the language of the Amendment. For the first time we are now told:

> "To state the obvious, the burden of proving that materials at issue subordinate women, as opposed to merely expressing the idea that women are or ought to be subordinate, will rest with plaintiffs in real cases. It will be a defense that the materials merely express an *idea about* the subordination of women."

Jur. St. at 17. A review of the "defenses" section of the Amendment (§ 16-3(g)(8)) fails to reveal this "defense" which appellants have invented as a response to the opinion of the Seventh Circuit.

The Amendment is also vague and ambiguous in its other substantive provisions. It uses words and phrases as terms of art without ever defining them. For example, § 16-17(b) creates a new tort in Indianapolis by providing that every woman has a claim under the Amendment "as a woman acting against the subordination of women." No attempt is made to explain how the term "subordination" is meant to be applied, or who can sue whom for what. To compound this problem, in an apparent attempt to avoid equal protection problems, every "man, child, or transsexual" also has a claim if he or she alleges an injury "in the same way that a woman is injured." The section defies comprehension.

Likewise, § 16-3(g)(4)(A) appears to exempt city, state and federally funded libraries, as well as university and college libraries, in which "pornography" is available for study, but subjects those same entities to liability if such materials are contained within a "special display presentation." However, the reference to "available for study"

leaves open the question whether distribution by loan is also exempt. Moreover, what is contemplated by "special display presentation" is nowhere disclosed.

§ 16-3(g)(6) makes "forcing pornography on a person" a discriminatory practice, yet the elements of such a charge are once again nowhere spelled out. This is particularly troublesome since the proscription specifically applies to actions in the home.

Even more serious is § 16-17(a)(6), which permits an injured woman to file a claim against an author, publisher, distributor, seller or producer of printed or visual materials when she can mount a colorable claim that the assault or attack was "directly caused by specific pornography." What that phrase means, or how such a charge is to be proved, is not disclosed. Nevertheless, the woman has a claim for damages, potentially subjecting a laundry list of persons in the chain of publishing or movie distribution to limitless monetary damages for unknown and unspecified injuries.

The exhaustion of remedies provision (§ 16-28) is also ambiguous. It states:

> "Nothing in this chapter shall affect any person's right to pursue any and all other rights and remedies available in any other local, state or federal forum."

One can only assume, based on statements by the authors of the Amendment, that the provision is intended to permit claims under the Amendment to be brought directly in court without the need to first file a complaint with the Board.

It is this sort of vagueness in a law directed at First Amendment protected freedoms that this Court in

NAACP v. *Button*, 371 U.S. 421, 433 (1963) stated cannot be tolerated.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
>
> "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their existence almost as potently as the actual application of sanctions . . . . .
>
> *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.*" (emphasis added)

See also Baggett v. *Bullitt*, 377 U.S. 360, 373 (1964) ("The uncertain meanings of the oaths require the oathtaker to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked . . . free speech may not be so inhibited").

The vagueness of the Amendment's scope is proven out of the mouths of the appellants and supporters of the Amendment. Before the Seventh Circuit, appellants stated that "[s]ex and therefore things which are sexual in nature are within the average adult's experience." (Appellants' Brief at 38.) However, Prof. Catherine A. MacKinnon, the author of the proposed ordinance which led to the Amendment, stated to the district court that pornography, need it be said, does not confine itself to conventional definitions of sex." (Brief of Linda Marchiano

Amicus Curiae at 32). Professor MacKinnon set forth a list of scenes she considers "sexually explicit," including:

1. "womens' bodies ravaged by cancer radiation treatment;"
2. "black womens' skin . . . used and abused," apparently not involving "conventional definitions of sex;" and
3. "a woman is hunted down" and murdered while "'romantic' music from a prior masturbation scene" is playing.

Id. Professor MacKinnon's discussion concludes: "This term 'sexually explicit' acknowledges the sexually dynamic quality of the material without using subjective sexual arousal as a standard for it . . . ." *Id.*

Appellants' sanitized posture before the Seventh Circuit and this Court seeks to conceal the conflicting arguments presented to the district court by the authors and supporters of the Amendment. If the appellants and *amici* in support of the Amendment could not agree below on the scope of the Amendment, how can any bookseller, distributor or publisher hope to comply with the Amendment without eliminating from the marketplace all words and pictures that arguably reveal women in an "inferior" position?

The lower courts thus correctly applied well-established First Amendment principles in reaching their unanimous decisions, and thus this appeal raises no substantial federal question.

POINT II

THE CONSTITUTION CLEARLY PROHIBITS CONTENT-BASED BANS ON FIRST AMENDMENT PROTECTED MATERIALS DEEMED BY SOME TO BE "OFFENSIVE."

The Amendment is a thinly disguised attempt, contrary to all accepted First Amendment principles and authorities, to ban First Amendment protected speech because it expresses views or condones conduct which may be objectionable to a segment of society. This Court has repeatedly held that expressive material that is harmful or hateful to a class of people cannot be banned on that ground.

The acts which concern appellants and which are incorporated in the Amendment's definition of "discriminatory practices" are for the most part already illegal. Some are addressed through the criminal law—such as assault, coercion, etc.—and others through laws prohibiting discrimination on the basis of gender. Non-obscene books, periodicals, motion pictures and other communicative materials depicting women in what some might consider a subordinate role, however offensive or antisocial they may be, remain speech protected by the First Amendment. Labeling First Amendment protected speech "subordination" does not change its nature.

The Amendment strikes at the paramount concept that First Amendment rights cannot selectively be denied. Quoting Madison's "Report on the Virginia Resolution," this Court in *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931) stated:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been de-

> cided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits."

At issue in *Near* was a Minnesota statute under which a vituperative anti-Semitic weekly newspaper was banned. This Court in *Near* explained the rationale for not permitting prior restraint when it stated:

> "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited. The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words."

Near v. *Minnesota*, 283 U.S. at 722. The Amendment has the same impermissible effect of allowing the Indianapolis and Marion County government to "prevent the circulation" of a book, magazine or movie on the ground that "some of its inhabitants . . violently disagree with it." The Amendment permits the Board, after the filing of a citizen's complaint or on its own initiative, to prohibit the distribution of materials if it determines them to fall within the law's uncertain and vague guidelines. It is such censorship that this Court in *Near* said cannot be tolerated.

In *Carey* v. *Population Services, Int'l*, 431 U.S. 678 (1977), this Court reaffirmed that:

> "At least where obscenity is not involved, we have consistently held that the fact that protected speech

> may be offensive to some does not justify its suppression."

431 U.S. at 701. *See also, e.g., Collin* v. *Smith*, 578 F.2d 1197, 1203 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Sambo's Restaurants, Inc.* v. *City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981).

Only speech which constitutes "the lewd and obscene, the profane, the libelous . . . the insulting or fighting words," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942), or child pornography, *New York* v. *Ferber*, 458 U.S. 747 (1982), may be restricted as outside First Amendment protection. The most closely related category upon which defendants could rely in support of the constitutionality of the Amendment is "obscenity," which is clearly and concededly to be inapplicable.

In *Miller* v. *California*, 413 U.S. 15 (1973), this Court established the three-prong standard which must be satisfied before sexually related material may be restricted as "obscene" and outside First Amendment protection. The test is:

> "(a) [W]hether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Miller, 413 U.S. at 24.

The Amendment makes absolutely no attempt to address, let alone comply with, that constitutional test. "Por-

nography," the operative term in the Amendment, contains no "community standard" test, does not require that the material be "patently offensive" or "taken as a whole," and fails to exempt works that have serious "literary, artistic, political or scientific value." The Amendment very clearly is intended to reach constitutionally protected materials, since none of the three prongs of the *Miller* test are present. As the Seventh Circuit noted, "one of the principal drafters of the [Amendment] has asserted, if a woman is subjected, why should it matter that the work has other value?" citing Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rts.—Civ. Lib. L. Rev. 1, 21 (1985). (App. at A-3)

Miller made clear that no sanctions may attach to the distribution of materials containing sex-related references unless the works, taken as a whole, constitute "hard core" pornography. *Miller*, 413 U.S. at 27.

The Amendment, however, restricts far more than "hard core" pornography.[4] The affidavit of Gary Garber of plaintiff Video Shack, Inc., a distributor of motion pictures on video cassettes and video discs, sets forth the following as examples of non-obscene films in his stock which appear to fall within the meaning of "pornography:"

1. "Dressed To Kill." (starring Michael Caine and Angie Dickinson)
2. "Tex" (starring Dudley Moore, Julie Andrews and Bo Derek)
3. "Star 80" (starring Mariel Hemingway and Cliff Robertson)
4. "Body Heat" (starring William Hurt and Kathleen Turner)

[4] The State of Indiana already has criminal statutes banning the importation, distribution, exhibition and sale of obscene material defined in accordance with *Miller*. Ind. Code §§ 35-30-10.1-1 *et seq.*

5. "SWEPT AWAY" (directed by Lina Wertmuller, and starring Giancarlo Giannini and Mariangela Melato)

6. "LAST TANGO IN PARIS" (starring Marlon Brando and Maria Schneider)

The affidavit of Bernard Rath, Executive Director of plaintiff American Booksellers Association, Inc., sets forth the following works of general fiction—many of which have also been made into motion pictures—carried by bookstores throughout the United States which appear to fall within the meaning of "pornography:"

a. John Updike—The Witches of Eastwick

b. Anais Nin—The Delta of Venus

c. Sidney Sheldon—The Other Side of Midnight

d. Judith Krantz—Scruples

e. Various James Bond novels by Ian Fleming

f. Harold Robbins—The Carpetbaggers

Further, as pointed out by Judge Easterbrook for the Court of Appeals, "W.B. Yeats's poem 'Leda and the Swan' (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda) . . . [and] the collected works of James Joyce, D.H. Lawrence, and John Cleland" are apparently banned. (App. at A-7) Since a multitude of other constitutionally protected books and magazines may also run afoul of the Amendment's proscriptions, a dealer will be forced to "cleanse" his stock of all potentially impermissible items, or risk legal action.

Appellants' heavy reliance upon *New York* v. *Ferber*, 458 U.S. 747 (1982), is totally misplaced. It is evident from the opinion of the Court in *Ferber* that the decision rests on

the unique status and "surpassing importance" given to protection of youth in our law. (458 U.S. at 757) In *Ferber*, the Court focused on the susceptibility of children to be exploited in sexual performances to which they could not legally consent.

Moreover, the New York statute at issue in *Ferber* is relatively narrow in scope compared with the vast range of materials apparently prohibited under the Amendment. New York prohibited the promotion of a sexual performance by a child under sixteen years of age involving "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." By contrast, the Amendment prohibits any words or pictures presenting women, for example, as sexual objects "through postures or positions of servility or submission or display." (§ 16-3(q)(6)) The Court neither suggested nor intended that *Ferber* emasculate the First Amendment by creating a broad exception for all cases in which there is claimed to be a "compelling state interest."

While *Ferber* was solely concerned with the welfare of abused children used in sexual performances, the Amendment creates a cause of action whereby "any woman may file a complaint as a woman acting against the subordination of women and any man, child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured . . . ." (§ 16-17(b)) There is no precedent for such a cause of action.

The Amendment presumes that "all" women are injured by the visual or verbal depiction of certain sexually related or sexually suggestive activities, even if the works in which such depictions appear are within First Amend-

ment protection. Since no particularized injury need be alleged, authors, publishers, distributors, wholesalers and sellers of general circulation materials will be under constant threat of civil action, and "those who do not have the money to litigate or who merely wish to remain cautious and avoid litigation will employ self-censorship." *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 896 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981) (CBS documentary allegedly casting hunters in a bad light held not to give rise to a cause of action). *See also, e.g., Church of Scientology of California v. Flynn*, 578 F. Supp. 266 (D. Mass. 1984) (allegedly libelous reference to "Scientologists" held not to give rise to a cause of action by the Church of Scientology on behalf of its members); *Talal v. Fanning*, 506 F. Supp. 186 (N.D. Calif. 1980) (airing of film "Death of a Princess" held not to give rise to a cause of action for defamation of a class of 600 million Muslims).

In an attempt to avoid the impact of the First Amendment, appellants suggest that *Roberts v. U.S. Jaycees*, 104 S.Ct. 3244 (1984), stands for the proposition that the interest of the State in eradicating discrimination based on sex is a superior interest to that embodied in the First Amendment to the Constitution. Jur. St. at 8, 15-16, 22. That suggestion misstates the holding of this Court. In the *Jaycees* case, this Court took pains to point out:

> "On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria."

104 S.Ct. at 3253. On its face, the Amendment *does* suppress speech by authorizing the banning of printed ma-

terials, *does* distinguish between prohibited and permitted activity on the basis of viewpoint, and *does* license the City officials to administer the statute on the basis of such constitutionally impermissible criteria. *Roberts* v. *U.S. Jaycees* thus affords appellants no support.

The courts below also properly and unanimously rejected appellants' reliance upon *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); and *Young* v. *American Mini-Theatres, Inc.*, 427 U.S. 50 (1976). The Amendment does not merely impose time, manner or place restrictions such as those in *Pacifica* and *American Mini Theatres*. In expansive and impressionistic language, the Amendment bans all words and pictures which may reveal women in a subordinated position or which may be said to engender a discriminatory attitude against women. Appellants attempt to avoid this pitfall by inventing "a defense that the materials merely express an *idea about* the subordination of women." Jur. St. at 17. *See supra* p. 10. However, this contorted distinction between words and pictures that subordinate women, and words and pictures that express the idea of subordination, cannot alter the fact that the Amendment bans speech on the basis of viewpoint. For example, the Amendment bans the "production, sale, exhibition or distribution" (§ 16-3(q)(4)) of pictures or words that present women "in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual." (§ 16-3(q)(5)) The Amendment thus defines the prohibited graphic sexually explicit speech on the basis of the perspective the author adopts. Speech presenting women as "filthy, inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual" is outlawed regardless of the literary, artistic or political qualities of

the work taken as a whole. The Amendment does not ban graphic sexually explicit words or pictures presenting women in positions of dominance or equality. The Seventh Circuit accurately concluded that:

> "[The Amendment] establishes an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images: those who do not, may not."

> "Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious — the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful."

App. at A-10 and A-9.

Contrary to all precedent of this Court, the Amendment selectively bans non-obscene words and pictures on the basis of content that is deemed offensive to one segment of society. The opinions of the district court and Seventh Circuit faithfully adhere to the clear precedent of this Court, and therefore the appellants' Jurisdictional Statement does not raise any substantial question requiring review by this Court.

POINT III

UNDER CLEAR PRECEDENT OF THIS COURT, APPELLEES HAVE STANDING AND STATE A CONCRETE CASE AND CONTROVERSY.

The Amendment regulates and prescribes what books and other First Amendment protected materials may be produced, sold, exhibited and distributed in Indianapolis. By regulating these activities, the Amendment directly affects the Indianapolis bookstore members of plaintiffs American Booksellers Association and National Association of College Stores, the publisher members of the Association of American Publishers whose books are offered for sale in Indianapolis, the International Periodical Distributors Association and Council for Periodical Distributors Association members which distribute magazines and paperback books in Indianapolis, and the individual plaintiffs who distribute, exhibit, sell, read and view First Amendment protected materials. This direct and immediate impact of the Amendment upon the plaintiffs and their members establishes a concrete case and controversy and gives plaintiffs standing to challenge the Amendment.

The United States Supreme Court "has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). Chief Justice Burger noted that, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.*

Where First Amendment rights are at stake, case or controversy and standing requirements have been relaxed so that litigants may preserve rights of free expression. *See Secretary of State of Maryland* v. *Munson*, 104 S.Ct. 2839 (1984) ("where there is a danger of chilling free speech, the concern that constitutional adjudication be avoided wherever possible may be outweighed by society's interest in having the statute challenged"); *see also Broadrick* v. *Oklahoma*, 413 U.S. 601, (1973) (challenge to statute restricting political activities of state civil servants permitted since the statute's existence may discourage persons not before the Court from engaging in protected speech).

The Amendment essentially bans all communicative materials that portray women in a "subordinated" position or may be said to engender a discriminatory attitude against women. The Amendment's proscriptions apply to the production, sale, exhibition and distribution of all communicative materials in Indianapolis. This regulation and proscription of the display of First Amendment protected materials constitutes the direct and immediate injury suffered by plaintiffs. In cases such as this, federal courts consistently have permitted persons situated as are plaintiffs to challenge the constitutionality of state or local statutes. *See, e.g., American Booksellers Ass'n* v. *Hudnut*, 771 F.2d 323 (7th Cir. 1985); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50, 55 (N.D. Ga. 1981).

Prior to, and throughout, the effective life of the Amendment, plaintiffs and their members were engaged in the production, sale, exhibition and distribution of First Amendment protected words and pictures that apparently were banned by the Amendment. The uncontradicted affidavits of Gary Garber and Bernard Rath filed in the district court in support of plaintiffs' motion for summary

judgment, set forth specific First Amendment protected works distributed or sold in the City of Indianapolis by plaintiffs which apparently fall within the scope of the Amendment. Plaintiffs reasonably fear that the Amendment may be enforced against them for trafficking in "pornography" (§ 16-3(g)(4)) and for assault "due to pornography" (§ 16-3(g)(7)).

All of the provisions of the Amendment have as their common denominator the Amendment's definition of pornography. That definition directly applies to appellees through the Amendments' trafficking and assault provisions and therefore that definition was properly before the courts below. Judge Barker found that definition to be unconstitutionally vague; therefore every cause of action based on that definition must fail. Even if plaintiffs-appellees were not to assert standing to challenge the "forcing pornography" provision of the Amendment, that provision must nonetheless fail because the predicate giving rise to that "offense" fails to pass constitutional muster.

Further, less than a year ago this Court held that a litigant may show that a challenged statute substantially abridges the First Amendment rights of other parties not before the court. *Secretary of State of Maryland v. Munson*, 104 S. Ct. 2839 (1984).

> "[W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims and with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

104 S.Ct. at 2847-48.

Appellees charge, and the courts below found, that the definition of pornography in the Amendment applies to material protected under the First Amendment. The trafficking and assault provisions of the Amendment give rise to a concrete case and controversy as to the appellees. Having demonstrated an injury in fact under the trafficking provision, appellees have standing to assert the rights of others that are infringed by the Amendment's definition of pornography as applied in the context of "forcing pornography" and "coercion into pornographic performance."

POINT IV

EVEN IF THE ISSUE OF ABSTENTION WERE PROPERLY BEFORE THE COURT, ABSTENTION WOULD NOT BE APPROPRIATE HERE.

The Court has repeatedly stated the general rule "that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106 (1976). Defendants-appellants did not raise the issue of abstention before the district court or in their briefs to the Seventh Circuit. Appellants' fleeting reference to abstention during oral argument before the Seventh Circuit is not proper or adequate to inject the issue of abstention into this action.

Even if abstention had been properly presented to the lower courts, recent precedent of this Court reaffirms that abstention would not be appropriate. Moreover, no state court decision consonant with this Court's First Amendment precedent could alter the lower courts' rulings that the Amendment is irretrievably and unconstitutionally vague.

In *Hawaii Housing Authority* v. *Midkiff*, 104 S.Ct. 2321, 2327 (1984), the Court stated:

> "In the abstract, of course, such possibilities [of limiting construction] always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, 'we have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.' Zwickler v. Koota, 389 U.S. 241, 251 . . . (1967)."

While the Amendment is "of an uncertain nature," *see supra* Point I, it is not "obviously susceptible of a limiting construction."

In *Brockett* v. *Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985), the Court considered a pre-enforcement facial challenge to a moral nuisance statute. The prosecutor argued in this Court that the courts below should have abstained. This position was rejected by the majority of the Court. In the concurring opinion, Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, stated that, in their view, abstention would be proper in *Brockett*, noting that the contention that the nuisance statute applied to any First Amendment protected expression rested on a "dubious" interpretation.

In contrast, the Amendment bans the production, sale, exhibition or distribution of words and pictures that, for example, present women "as sexual objects . . . through postures or positions of servility or submission or display." (§ 16-3(q)(6)) During oral argument before the district court, defendant-appellants conceded that the Amendment is directed at non-obscene materials that are protected by the First Amendment.

The federal constitutional issues at stake in this action predominate over any remote possibility that a state court

could understand and narrowly construe to be constitutional such terms as "subordination," "sexual objects who enjoy pain or humiliation," "sexual objects who experience sexual pleasure in being raped," "scenarios of degradation, injury, abasement, torture," "shown as filthy or inferior . . . in a context that makes these conditions sexual," or "sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." (§ 16-3(q)).

The Amendment is not "obviously susceptible of a limiting construction," *Midkiff*, *supra*, 104 S.Ct. at 2327. Abstention therefore is not appropriate.[5]

CONCLUSION

Under well-settled precedent of this Court, the language and purpose of the Amendment violates the First Amendment. This appeal raises no substantial question that would warrant this Court's review, and therefore the appeal should be dismissed or affirmed.

Respectfully submitted,

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5. Even if the Amendment were obviously susceptible of a limited construction which would cure its constitutional defects, the appropriate procedure would be for the district court to enjoin enforcement of the Amendment and retain jurisdiction pending the state court's decision. *England* v. *Louisiana State Board*, 375 U.S. 411 (1964).

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No. 85-1090

IN THE

Supreme Court of the United States

October Term, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, Indiana, et al.,

Appellants

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO APPELLEES' MOTION TO AFFIRM OR DISMISS

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I. Appellees and the lower courts ignore the harm of pornography and with it the constitutionality of the Ordinance.

Pornography, as defined in this Ordinance, serves none of the purposes for which speech is protected. (Brief of Defendants-Appellants at 12-22) In justifying the Ordinance under First Amendment standards, Indianapolis has never conceded that pornography is protected speech. "[T]o say the ordinance presents a First Amendment *issue* is not necessarily to say it constitutes a First Amendment *violation.*" *Los Angeles v. Taxpayers for Vincent*, 104 S.Ct. 2118, 2128 (1984). Only the discredited absolutist approach, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570 (1976), which appellees implicitly seek to advance through this litigation, holds to the contrary.

Based on knowledge that was previously unavailable, the Ordinance responds to a social problem that has defied effective solution. Both courts that have ruled on this ordinance have explicitly accepted its record of harm; appellees appear to have abandoned their prior attempts to deny it. They do argue that obscenity law solves whatever valid problem the Ordinance addresses. (Appellees' Motion to Affirm or Dismiss at 17) It is inconsistent to argue, as appellees do, both that pornography, as defined, is protected speech and also that it overlaps obscenity law. To the degree the two develop — as in theory the parties agree they do — to that degree the Ordinance is unquestionably constitutional without need for further justification.

In reality, however, obscenity law exists, and so does pornography, with its attendant abuses of persons. Indianapolis has seen the pornography industry double its gross in the past ten years under the aegis of the social protection ostensibly provided by the obscenity prohibition. Organized crime has dominated it more and more. Designed to circumvent obscenity law, pornography has

become increasingly violent, requiring more violence to make it and producing more acts of violence in some who consume it. The harms of its production and use to women and children, in particular, have become visible as never before. Indianapolis seeks to provide the supplemental remedy of civil actions by victims who can prove harm. Accepting the harm on the record but refusing to allow its victims access to court, the lower courts and appellees have in effect determined that they are expendable.

Appellees erase the concrete abuses they do not contest from their First Amendment discussion. As a result, they never confront the theory of this ordinance. This ordinance has never once been defended on grounds of pornography's "offensiveness," yet appellees argue that this is its underlying impulse. Review the causes of action one at a time. Victims of coercion into pornography, for example, can sue for the coercion itself and to remove its products from the market under §16-3(5). Pornography produced by coercion is the product of the forcible exploitation of a human being, a violation that is enhanced with every showing: "virtually every time some one watches that film, they are watching me being raped." (Testimony of L. Marchiano, coerced performer, Brief of Defendants-Appellants, Exhibit U.) Coercion is made actionable to rectify this, not because watching a woman being raped is "deemed offensive to one segment of society." (Appellees' Motion at 22) The severability clause specifically provides that "It is further declared to be the intent of the City-County Council that the ordinance be upheld as applied to the graphic depiction of actual sexual subordination whether or not upheld as applied to material produced without the participation of human subjects . . ." (Appendix E at E-34) It cannot be true that a woman can be strung from the rafters and if a sex picture is made of it, it is protected speech. But so long as the market for

these materials is permitted to exist, the incentive for such coercion remains.[1]

Appellees and the Court of Appeals thus distort but do not answer a *question* asked by one author of this ordinance: "if a woman is subjected, why should it matter that the work has other value?" (Appellees' Motion at 17) This query does no more than echo *New York v. Ferber*, 458 U.S. 747 (1982), by suggesting that human beings matter above materials made using them. Appellees and the Seventh Circuit in effect take the position that if a work has value, it does not matter if a woman is coerced. Indianapolis respectfully disagrees.

II. The Ordinance is not unconstitutionally vague.

Contrary to appellees (Appellees' Motion at 6), the Court of Appeals did not even see fit to rule on the issue of vagueness, so appellants did not brief it here. (*See* Brief of Defendants-Appellants at 32-54.) On the basis of the contrived ignorance of self-serving uncross-examined affidavits, appellees indiscriminately intermingle due process vagueness with functional overbreadth, applying the doctrine of neither. Applying the law of vagueness instead of individualized notions of clarity which derive from personal experience or value judgments, the Ordinance is not legally vague.

A law is impermissibly vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Con-*

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[1] The *need* for a law is a legislative judgment, not a constitutional one. Lynching was already murder, but before 42 U.S.C. § 1985 (3), the Ku Klux Klan was addressed almost as effectually as the empire of the pornographers is now. Like the pornographers, the Klan was already illegal and practiced concerted terrorism by targeting victims by a group characteristic determined by birth. The profit motive has made the pornography industry further impervious to prior regulation.

struction Company, 269 U.S. 385, 391 (1925). Because "few words possess the precision of mathematical symbols . . . no more than a reasonable degree of certainty can be demanded." *Boyce Motor Lines v. U.S.*, 342 U.S. 337, 340 (1952). The requirement of reasonable certainty permits "the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding . . ." *Id.* at 340-41. All of the terms appellees challenge have either a technical, special, or commonly understood meaning, or are further defined or given a standard for usage by the Ordinance. *Connally*, 269 U.S. at 391-92.

"Pornography" becomes a legal term of art for the first time by the definition in this ordinance. A definition is an acceptable way to avoid the pitfalls of vagueness. *Id.* The objectivity and concreteness of the definition is revealed by comparing it with "obscenity," *Miller v. California*, 413 U.S. 15 (1973), one of several legal prohibitions on subsets of sexually explicit materials which are not unconstitutionally vague. Obscenity must violate "contemporary community standards," a standard infinitely elastic by design. Obscenity depends upon a viewer's subjective determination of whether the material appeals to the "prurient interest" in sex. Equally subjective is the term "patently offensive." Offensiveness *is* the harm obscenity identifies.

"Pornography," by contrast, is objective. Acts of coercion, force, assault, or trafficking must occur. The definition identifies the concrete harm of this medium: "pornography *is* the graphic sexually explicit subordination of women . . ." The harm of pornography is the civil inequality of the sexes, not of bad taste. "Sexually explicit" identifies an external feature of the materials, not an internal response to them. The six specific scenarios which must also be present, §16-3(q)(1)-(6), are descriptive and concrete, not conceptual and speculative.

Appellees challenge "sexually explicit" and "subordination" with particular venom. Their strategy is to present each term in a statutory vacuum, when by construction all elements must be present. Only if material is sexually explicit would any other element come into question. Only if one of the six scenarios is present — e.g., women enjoying rape, being tortured, penetrated by an animal, etc. — would a question of subordination arise. Contrary to appellees (Appellees' Motion at 19), materials that exclusively fall under §16-3(q)(6) are *exempt* from a trafficking claim. Vagueness concerns could arise there only if, for example, a woman sued for *coercion* into materials in which she was presented "in postures of servility, submission or display." A woman can not be coerced into *The Witches of Eastwick*.

The trafficking provision covers only a particularly violent subset of sexually explicit materials. "Sexually explicit" has a meaning which is commonly understood in dictionaries, in popular usage, and in law, where it approaches being a term of art. In WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (4th ed. 1976) ("WEBSTER'S"), "sexually" means "with regard to or by means of sex." *Id.* at 2082. Sex, hence the sexual, is within the average adult's experience. "Explicit" is "characterized by full clear expression: *being without vagueness* or ambiguity: leaving nothing implied." *Id.* at 801 (emphasis added). Sex that is explicit is by definition not vague. "Graphic" underlines how unambiguously sexually explicit the materials must be.

Courts know what "sexually explicit" means. They routinely use it to clarify other terms, *e.g.*, *John Hancock Mutual Life Insurance Co. v. Dutton*, 585 F.2d 1289, 1295 (5th Cir. 1978); *Young v. Abrams*, 698 F.2d 131, 136 (2d Cir. 1983). *See also Miller v. California*, 413 U.S. 15 (1973); *Pepperling v. Crist*, 678 F.2d 787 (9th Cir. 1982). In *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), the term

designated a category of materials presumptively entitled to less constitutional protection. Courts considering this ruling use the term without trouble. *See, e.g., Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 831 n. 13, 834 (4th Cir. 1979); *Avalon Cinema v. Reed Thompson*, 658 F.2d 555 (8th Cir. 1981). This Court used it in *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975), to clarify that a nudity prohibition was overbroad that was not limited to "sexually explicit" nudity. *Id.* at 213. For constitutional purposes, sexually explicit thus cannot mean mere nudity.

Most of the examples appellees and the lower courts list as covered by this ordinance are frankly ludicrous. They are not even marginally sexually explicit under existing law. Those which are, typically are only in "isolated passages or parts," §16-3 (4)(c), *which cannot ground a trafficking claim.*[2]. The pornographers, intervenors in the District Court, know the difference: "None of the plaintiffs identified in the complaint of American Booksellers Associations, Inc., and others alleges that it sells or exhibits materials dealing with sex, much less specializes in the sale or exhibition of such materials as do intervenors." (I.S.S.I. Theatre, Inc., Motion to Intervene as Plaintiffs at 2)

Sexually explicit materials must also be graphic, contain one of the listed scenarios, and subordinate on the basis of sex. Courts have upheld statutory terms which have well-settled common meanings or are given a stan-

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2 A passage from Professor MacKinnon's Brief of Linda Marchiano *Amicus Curiae* at 31-32 is almost unethically misquoted and distorted by appellees. (Appellees' Motion at 13) Her examples merely illustrate sadomasochism, which is *part of* most existing definitions of the sexually explicit. *See* 18 U.S.C. § 2255(2)(d), held not vague in *U.S. v. Fogerty*, 663 F.2d 928, 936 (9th Cir. 1981); N.Y. Penal Law §263.3, upheld by *New York v. Ferber*, 458 U.S. 747 (1982); Fla. Stat. 847.01 (2)(a)(ii), held not vague in *Griffin v. State of Florida*, 396 S. Rptr. 2d. 152, 154 (Fla. 1981); Ind. Code § 35-42-4-4(a) (West's Supp. 1985).

dard of usage by the text of the law. *Connally*, 269 U.S. at 391-92. "Subordination" satisfies both. "Subordination" is commonly the act, quality, or arrangement of "making secondary or subject" as in "inferiority of rank or dignity" or as in "a position of inferior status." WEBSTER'S at 2277.

Inferiority of rank or status is commonly experienced and understood. To be a subordinate in a hierarchy such as teacher/student, employer/employee or parent/child is the opposite of being an equal. The point of sex equality law is that man/woman not be such a hierarchy. Acts of subordination enforce second class status. By requiring that material which subordinates women also include women being *sexually abused*, the numbered scenarios provide a standard for usage of the term. That which subordinates, as opposed to merely expressing an idea about subordination, is a factual judgment, requiring an ability to distinguish, for example, between materials like the text of the ordinance itself, which describes pornography in graphic detail, and the pornography it describes. The need for some judgment does not make a law legally vague. The jurisprudence against group-based discrimination, of which the Ordinance is a part, sets itself against "the stigma of inferiority and second class citizenship." *Sa'iler Inn v. Kirby*, 5 Cal.3d 1,19, 485 P.2d 529, 540 (1971). This legal context further circumscribes "subordination" by placing it in a setting of understood violations of human rights.

The Ordinance describes in simple words a body of material which is not all vague in the world. Pornography is produced by an industry which knows what to put in it. It is sold largely through identifiable outlets to customers who know where to go and what they want. Any real case would test this law's adequacy at delineating this very distinct social phenomenon.

III. Appellees state no Article III "case or controversy."

Appellees rely upon "facial" overbreadth, *Secretary of State of Maryland v. Munson*, 104 S.Ct. 2839 (1984), for access to court. The doctrine is inapt. In *Munson*, "[t]he first element of the standing requirement that Munson must satisfy . . . is the 'case or controversy' requirement . . ." 104 S.Ct. at 2846. Because the Secretary of State had told Munson it would be prosecuted if it failed to comply with the statute in question, "Munson suffered both threatened and actual injury as a result of the statute." *Id.* The Court then held that Munson could *also* challenge the statute facially for overbreadth on behalf of third parties. This "facial overbreadth" exception, whether viewed as a prudential rule of constitutional practice as in *Munson*, 104 S.Ct. at 2846-48, or as a technical rule of First Amendment standing as in *Regan v. Time*, 104 S.Ct. 3262, 3268 n.8 (1984), does not abrogate the rule that the *original* party must *first* show actual or threatened injury.

Thus appellees' assertion that standing is relaxed in First Amendment cases (Appellees' Motion at 24) is true only for raising third party interests by parties who have otherwise stated a cognizeable injury. Appellees' assertions that the Ordinance bans First Amendment protected materials are no more than legal conclusions which do not rise to the level of a showing of objective and personal, actual or immediately threatened harm. Their attack on this entire statutory scheme in the absence of any real injury has also led the lower courts into otherwise unthinkable errors of construction and application which the doctrines of standing and abstention are both designed to avoid.

IV. Conclusion

Three divergent theories of this ordinance's invalidity have arisen in this litigation. The trial court essentially found the Ordinance did not fit into existing exceptions to the First Amendment. The Court of Appeals found that the free market of ideas requires freedom of pornography because it is a vehicle for a viewpoint, no matter what harm is done. Appellees maintain prominently here that it is vague and implicitly that it is overbroad. The Court of Appeals affirmed the District Court but adopted none of its approach. Appellees would similarly leave the Court of Appeals decision standing but urge virtually none of its reasoning. This suggests that the supposed invalidity of the Ordinance follows from no clear theory. It more than suggests that there is a substantial federal question in this case. If appellees' view is appealing, summary affirmance is hardly the vehicle to advance it.

Neither appellees nor the lower courts acknowledge the city's affirmative First Amendment argument, *see C.B.S., Inc. v. F.C.C.*, 453 U.S. 367, 396 (1981); *F.C.C. v. League of Women Voters*, 104 S.Ct. 3106, 3117 (1984), that making pornographers responsible for damage they do would enhance access to speech for those whom pornography has silenced. In the view of Indianapolis, it disagraces the Constitution to hold that one group must suffer — must forfeit its dignity, its honor, its security, its civil equality — to guarantee another group its pleasure, profits, and freedom to use them. It makes it no better that the industry which practices this abuse is an industry of pictures and words.